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THE PHŒNIX BANK CASES.

No recent event, of a financial character, has caused more excitement and indignation, in Massachusetts, than the failure of the Phœnix Bank, at Charlestown. This institution, with a capital of three hundred thousand dollars, had passed the financial difficulties of the country with great credit, and no bank in the commonwealth was higher in public estimation. The president, who was known to have the principal control of its affairs, enjoyed the confidence of all who knew him; his character was above reproach. In this state of things, immediately after a dividend had been declared, the astounding disclosure was made public, that the whole capital of the bank had been sunk; and that this fraudulent appropriation of the fund had been going on several years, notwithstanding the frequent examinations of the bank commissioners and the vigilance of the directors.

The president of the bank, William Wyman, acknowledged that he was responsible for the whole transaction; that he had deceived the directors, but averred that he had received no part of the funds himself, the whole or a great part having been lent to the firm of Stanley, Reed & Co. in Boston, two members of which were then deceased. That he had yielded to the urgent persuasions of this firm to lend them the sum of $15,000, without the knowledge of the directors, and their wants and demands had gradually increased, until at length, an immense sum had been absorbed in their operations.

Upon this state of facts, the president of the bank, the cashier, Thomas Browne, Jr. and William H. Skinner, the surviving part-

ner of the firm of Stanley, Reed & Co. were arrested, and, on examination, were ordered to give bail on a charge of embezzlement. At the next term of the court of common pleas, at Concord, in August last, before Mr. Justice Allen, a true bill was found against the defendants, and the trial came on at the same term of the court. It is not our intention to give a particular account of the proceedings at this trial, as the case is still pending, and we deem it more proper to reserve a full consideration of the case and a discussion of the legal principles involved, until the points have been adjudicated upon by the supreme court, where they are now pending. Our present purpose is to give a brief history of the case, with a notice of some collateral facts.

The indictment charged embezzlement and larceny in Wyman and Browne as principals, and Skinner as accessory, and was founded on the Revised Statutes, chapter 126, section 27, which is in the following words: — "If any cashier, or other officer, agent, or servant of any incorporated bank, shall embezzle, or fraudulently convert to his own use, or shall fraudulently take or secrete, with intent to convert to his own use, any bullion, money, note, bill, obligation or security, or any other effects or property, belonging to and in possession of such bank, or belonging to any person, and deposited therein, he shall be deemed, by so doing, to have committed the crime of larceny in such bank, and shall be punished by imprisonment in the state prison, not more than ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail, not more than two years."

The counsel for the defence were, Daniel Webster and Franklin Dexter, for Wyman; Rufus Choate, Sydney Bartlett, A. W. Austin, and E. R. Hoar, for Skinner; and Mr. Choate and Mr. Bartlett for Browne. Asahel Huntington, district attorney for the northern district, and Daniel Wells, district attorney for the western district, conducted the prosecution.

The counsel for Skinner moved the court for a separate trial, which, after argument, was granted. The counsel for the other defendants then moved, that the prosecuting officer should be called upon to elect which of the counts in the indictment he intended to rely upon; and this, too, was decided in favor of the prisoners.

The testimony in the case was very voluminous, although the facts were few. The principal evidence came from the directors, from which it appeared that Wyman had their entire confidence, and that they yielded to him nearly the whole management of the bank. It appeared, that they had been guilty of the grossest negligence, were nearly all large debtors to the bank, and had sanc-

tioned Wyman's habit of lending large sums to the directors, on demand notes. When their suspicions became aroused, Wyman confessed that the bank was ruined. On inquiry, as to where the money had gone, he declined answering until he had consulted counsel; but produced a large number of demand notes of Stanley Reed & Co., which were worthless. Wyman stated that he let this firm have $15,000 in 1839, on their note, on a very pressing emergency, and had gone on, from step to step, until the present time.

The counsel for Wyman, in the defence, did not deny that he had been an unfaithful officer; but they contended, with great ability and force, that he was not guilty of the specific offence charged in the indictment; and the respective counsel argued, at length, as to what constituted the crime of embezzlement, within the meaning of the statute; the defendants' counsel contending that there must not only be a fraudulent act by the defendants, but that the appropriation must have been for *their own benefit*, and this must be proved by the government. They also insisted, that the prosecuting attorney must specify some one act of embezzlement, on which he meant to rely. Upon these points, the court ruled against the defendants, and held, upon the first point, that if the jury were satisfied that the defendants took the money of the bank, against the knowledge of the directors, and contrary to the interests of the bank, for his own use, *or for the use of others*, it was a fraudulent taking, and for a fraudulent purpose, and was embezzlement, within the meaning and intent of the statute.

Mr. Webster, in closing the defence, made a most able argument, and urged, with great ingenuity and zeal to the jury, that the defendant Wyman, although not free from blame, was not guilty of the crime charged. He had committed a breach of trust, for which he might be punished, but there was not the slightest evidence that he had ever appropriated a dollar to his own use. He commented, with great severity, upon the conduct of the directors, who were themselves guilty of the grossest negligence, if not fraudulent practices. He alluded to the fact, that a civil suit had been commenced against them by a stockholder, and they were desirous of convicting Wyman, for the purpose of preventing his testimony against them in that suit. He also remarked upon the poor appearance of the directors on the stand.

Mr. Huntington replied at much length, and in an argument of great strength and acuteness. He took up the question of Mr. Webster, "*What has become of the money?*" and made a forcible application of it to the defendants. It was for them to answer the

question. *They* once had the money, what had they done with it? He also examined the evidence with great care and clearness; and although in strength and power his argument was not equal to Mr. Webster's, yet, in acuteness, aptness of illustration, and skilful analysis and application of facts, it was superior.

The jury, after being out several hours, returned a verdict of not guilty, as to Browne, but were not able to agree as to Wyman, and there being no probability that they would agree, they were discharged.

The case was again tried at Lowell, in the same court, and before the same judge, in November last. The defence was conducted by Mr. Webster and Mr. Dexter, and the prosecution by Mr. Wells and Mr. Huntington. The general course of the testimony was similar to that produced at the first trial, with some additional and significant facts, as to the motives of the defendant, tending to show an appropriation of some of the funds to his own benefit.

The jury returned a verdict of guilty, and the defendant's counsel having taken exceptions to the ruling of the judge, they will be argued before the supreme court. Meanwhile, the defendant is under bonds in the sum of $60,000, for his appearance.[1]

The firmness and ability manifested by the judge who presided at these trials, was the subject of great commendation, by all who were familiar with the cases. At the second trial, the case for the prosecution was closed by Mr. Wells, in an argument of great power. We cannot help remarking here, upon the act of the last legislature, in reducing the salaries of these two district attorneys, from one thousand dollars to seven hundred dollars each. That men of their ability should he willing to perform such labors on these terms, is surprising, but if they are, it is no reason why the commonwealth should refuse to pay its officers a liberal compensation. In this very case, no one doubts that the counsel for the defence received a compensation at each trial, equal to double the salaries of both prosecuting officers *for a whole year*. How can those who were instrumental in reducing these salaries, complain of the difference between the rich and the poor, in the administration of the laws? If the government refuses to pay a compensation which will induce the ablest men to engage in its behalf, will not the

[1] The district attorney moved that the bonds be increased to $100,000, but this was denied. We are not aware what reasons were assigned; but it is apparent that if the defendant has received a considerable portion of the embezzled funds, he can pay his bonds, and make a fair speculation besides.

rich criminal, by employing abler counsel than the poor can afford to do, necessarily stand a better chance to escape?

It is obvious, that at a trial like this, where there was an array of the most eminent counsel, and when there was great excitement in the community, there would be many interesting circumstances growing out of the case, some of which are worth stating in this connection.[1] It was remarked in the newspapers that no one in the court seemed to enjoy the trial more than the defendant, Wyman, who sat in the bar by the side of his counsel, and dined at the public table with the sheriff and others; and a writer undertook to moralize upon this appearance of a person charged with a state's prison offence. The fact is significant, as showing the laxity which has grown up in regard to the public estimation of criminals, especially those who have *only* been guilty of fraudulent appropriation of the funds of a corporation. As to the prisoner's sitting by the side of his counsel, that is an affair of every day's occurrence. Indeed, the prisoner's dock seems to be going out of fashion, and a stranger in court is sometimes at a loss to know who is on trial. In many parts of the country the profession are crowded out of the bar by the spectators; and perhaps the latter may ere long be compelled to give place to the prisoners, who may prefer a more convenient and respectable position than the dock.

In a former notice of this case (ante, p. 238,) we alluded to a collision between Mr. Huntington and Mr. Webster, in consequence of the former alluding to the large number of eminent counsel retained in the defence, and intimating that the funds of the bank had gone to fee these counsel. We have heard various opinions expressed upon this subject as a matter of professional etiquette.

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[1] We have heard a characteristic anecdote of Mr. Webster, which we presume there is no impropriety in relating here. In the course of the trial, and in a most exciting passage, when all the counsel *appeared* to be intent upon the case and nothing else, Mr. Webster wrote on a slip of paper the favorite couplet of Pope, and passed it to Mr. Choate: —

> "Lo, where Mæotis sleeps, and softly flows
> The freezing Tanais through a waste of snows."

Mr. Choate writes at the bottom "*wrong*" —

> "Lo, where Mæotis sleeps, and *hardly* flows
> The freezing Tanais through a waste of snows."

Mr. Webster rejoins, "*right*," and offers a wager. A messenger was despatched for Pope, when it appeared that the present senator had the advantage of his predecessor, and was right. Mr. Webster gravely wrote on the copy of Pope, "*spurious edition!*" and the subject was dropped. All this while the spectators were in the full belief that the learned counsel were in earnest consultation on some difficult point of law.

Perhaps the manner in which Mr. Huntington made the remark was a little too open, not to say coarse, but it will hardly be denied, that in a discussion as to what had become of a large amount of money, the fact that the person on trial has the most eminent counsel to be found in the country, may be properly instanced as showing an ability to command such extraordinary services. But this is delicate ground and should be cautiously approached.

At the trial in Lowell there was a slight collision between the judge and Mr. Webster, which has been variously reported. In the Boston Morning Post, it was stated, that, in the course of the judge's charge he was reminded by Mr. Webster that he was mistaken in some points of the evidence, whereupon the judge replied, "The court cannot be interrupted, sir." "And I will not be misrepresented, may it please your honor," was responded. "Sit down, sir," angrily responded the judge. It is quite apparent, that this cannot be a correct report, and in the next number of the paper there appeared the following communication, which was addressed to the editor.

"Your informant has misunderstood the occurrence which was reported yesterday to have taken place at Lowell, on the trial of William Wyman. I will thank you to publish the following correction: — In the course of his charge, Judge Allen stated some positions taken by the defendant's counsel in a manner different from that in which they were intended. Mr. Webster twice interfered to correct the judge. No objection was taken to these interruptions; but in proceeding with the charge, Judge Allen remarked to the jury, in substance, that the counsel for the defendant had stated to them their own opinions on the law which must govern the case; but whatever weight the opinions of those gentlemen would have, under other circumstances, it was to be remembered that counsel in the trial of causes stated the law to the jury in such a manner as they thought would best avail their client, and were governed only by that consideration. Mr. Webster said that, as one of the bar, he disavowed any such practice as that imputed by the judge. Judge Allen — 'I beg I may not be interrupted.' Mr. Webster — 'And I beg, sir, that I may not be misrepresented. I know of no practice among the bar to misstate the law or the fact; and I would not do it for my dearest friend.' Judge Allen then proceeded to make some further remarks upon the course pursued by the counsel for the defendant, which, as it does not tend to explain the mistake of your correspondent, and produced no further reply, it is unnecessary now to repeat. The judge did not at any time 'command' or request Mr. Webster to sit down."

It is apparent that Mr. Webster put his own opinion in the case upon the law, in a more marked manner than is usual; and it was undoubtedly the duty of the court to remind the jury, that the opinions of counsel were under a bias which was not felt by the court, and that the safer guide for them is the opinion of the court in any case where counsel put their own opinion against that of the judge. As to how far it is proper or expedient for counsel to put

their own opinion into their cases, is a question of some difficulty. But it surely seems more in accordance with the true theory of our profession for counsel to appear merely as the *advocates* of one side of the case, without attempting to usurp, in the slightest degree, the functions of the judge.

At the first trial of this case, John A. Bolles, Esq., the secretary of state, was summoned to appear with the original returns of the Phœnix Bank. The secretary appeared with *copies* of the returns, which were objected to, but finally admitted by the consent of counsel. At the second trial, the secretary again appeared without the originals, and requested that some order might be passed for him to have some authority to show why he transferred the papers from their customary place of deposit. The judge very properly declined to enter into any discussion on the subject or to make any such order, intimating that if the witness failed to comply with the subpœna, he would do so at his peril. The secretary, in a subsequent publication, makes a tart allusion to this matter, and throws out some suggestions as to the danger of removing the papers in his office from their customary place of deposit, which are entitled to consideration. He concludes thus:

"Had the business of the secretary's office been so situated that I could have left it, without great public inconvenience, in the hands of my clerks, or had I felt certain that the interests of the commonwealth, in the trial of Wyman, would not have been prejudiced by my refusal to produce and surrender the returns, I should have declined compliance with the *subpœna*, — suffered myself to be subjected to the imprisonment for contempt, which Judge Allen was kind enough to suggest, and then, upon a writ of *habeas corpus*, brought the question before the supreme judicial court. Situated as I was, however, — overwhelmed with the burden of the fall labors of this office, — and being unwilling to delay the trial of Wyman, which had already consumed a vast amount of time, it seemed to me advisable to produce the papers, — and afterwards communicate the facts to the general court, and thus give to the legislature the opportunity of making such provision for the future safety of the public records, and the security of the officer in whose custody they are placed, as may appear necessary and proper."

Upon the whole, we regard the result of this trial with great satisfaction. Without intending to offer any opinion upon those points of law which are yet to be decided, we may safely express a hope, that the authors of this enormous fraud may meet with condign punishment. There is no more painful spectacle than that of a broken bank — a bankrupt corporation. It is impossible ever to know how much personal suffering follows such an event. The rich, who lose the most, are in reality the smallest sufferers; for the failure of a bank falls on the poor with a crushing weight. The laborer's all is dissipated in a moment; the widow's mite is there!

And yet these outrageous frauds have of late gone almost entirely unpunished even in Massachusetts, and there has seemed to be no law whatever for the swindling transactions of moneyed corporations. We have the utmost confidence, that the case we are considering will be justly decided, by the high tribunal before which it is now pending. We only fear that the defendant will not remain in our community until the case is determined.

Recent American Decisions.

Circuit Court of the United States, Massachusetts, December, 1843, *at Boston. In Bankruptcy.*

IN THE MATTER OF JOSEPH RICHARDSON AND ANOTHER.

The doctrine that in law there is no fraction of a day, is a mere legal fiction, and is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case.

By the constitution of the United States, the very time of the approval of a public law, constitutes the time as to when the law is to have its effect, and then to have its effect prospectively and not retrospectively.

A petition for the benefit of the bankrupt act was filed in the district court on the third day of March, 1843, about noon; the act of the third of March, 1843, repealing the bankrupt act, passed congress, and was approved by the president, late in the evening of the same day. *Held*, that the court had jurisdiction of the petition at the time when it was filed and acted upon, and that it had full jurisdiction to entertain all proceedings thereon, to the close thereof, according to the provisions of the bankrupt act. [See *Matter of Howes*, *ante*, 297.]

THE following statement of facts, and the question arising thereon, was adjourned into this court from the district court of Massachusetts, to wit: The petition for a decree of bankruptcy, in this case, was filed about noon of the third day of March, A. D. 1843, and due notice thereof was ordered and published, and the same was duly proved in court, on the second Tuesday of May following, being the time and place appointed for the hearing of said petition. The act of congress, entitled "An act to repeal the bankrupt act," was approved by the president of the United

States, late in the evening of the same third day of March, to wit, several hours after the filing of said petition. Whereupon counsel, for the petitioner, raised the following preliminary question for the decision of the court: "Has the district court jurisdiction to receive said petition, and entertain all proceedings thereon to the close thereof, according to the provisions of the act, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved on the 19th day of August, A. D. 1841?"

No person appeared to contest the application of the petitioners.

J. Giles, for the petitioners, argued as follows: — The case is apparently new. After considerable investigation, I am not able to refer the court to any well settled authorities, which bear directly upon the point to be decided. The discussions in the English and foreign law of the proper rule to be adopted in fixing the commencement of new statutes, and the time when treaties shall take effect, relate principally to the injustice of considering a statute in force, in all parts of an extended country before it can possibly be known to all the citizens, and the impossibility in point of fact of bringing any law to the actual knowledge of all persons who are to be governed by it, and are too remotely connected with the exact point in this case to justify me in bringing them under the review of the court. I do not find well considered decisions sufficiently in point to enable the court to decide this question upon authority. This case must turn upon its own merits, and some peculiar considerations, soon to be noticed, drawn from the language of the constitution of the United States.

The case finds that the petitioners filed their petition to be declared bankrupts on the third day of March, 1843, several hours before the president had signed the repealing act, on the same third of March, 1843. The repealing act is in the following terms — "Be it enacted, &c. That the act entitled an act to establish a uniform system of bankruptcy throughout the United States, approved on the nineteenth day of August, eighteen hundred and forty-one, be, and the same hereby is, repealed. Provided that this act shall not affect any cause or proceeding in bankruptcy *commenced before the passage of this act*, or any pains, penalties or forfeitures, incurred under the said act; but every such proceeding may be continued to its final consummation, in like manner as if this act had not been passed. Approved, March 3, 1843."

This act saves all cases in bankruptcy commenced before its passage. The passage of this act is matter of record, and it stands upon the public records, "Approved March 3, 1843." The filing

of the petition in bankruptcy by the petitioners is also a matter of record, and it stands on the records of the court, "filed March 3, 1843." See Bankrupt Act, section 13, Rules I. and III.

The petition, therefore, does not come within the proviso of the repealing act, unless a fraction of a day be allowed, and it can be legally shown, as the case finds, that in point of fact the petition was filed some hours before the repealing act was approved and signed by the president.

In England, prior to April 8, 1793, every act of parliament, in which no particular time was specified for its commencement, was held to operate and take effect from the first day of that session of parliament wherein it was made, *Panter* v. *Attorney General*, 25th May, 1772, (6 Bro. P. C. 486.)

In *Latless* v. *Holmes*, (4 T. R. 660) it was held, that an act to take effect from and after its passage, operated by legal relation from the first day of the session, and the court relied upon *Panter* v. *Attorney General*, just cited. In *Latless* v. *Holmes*, the court observed, that *though the day when the act received the royal assent be stated in this case, we can only know by reference to the statute book, when the act passed.* This rule, that acts of parliaments, when no time was fixed for their commencement, related to and took effect from the first day of the session, was declared as early as Henry VI., and adhered to down to April 8, 1793, though the consequence of it was sometimes to render an act murder, which would not have been so without such relation. Dwarris on Statutes, Part 2d, p. 682, and cases there cited.

The Statute of 33 George III. ch. 13, reciting that the above rule of law is liable to produce great and manifest injustice, enacted that the clerk of the parliament should indorse on every act of parliament to be passed, after April 8, 1793, immediately after the title of the act, the *day*, *month* and *year* when the same shall have passed and received the royal assent, and such indorsement shall be taken to be a part of the act, and to be the date of its commencement, when no other commencement shall be therein provided. Since this act, I do not find any instance, where it has been inquired into, what particular hour of the day an act passed and received the royal assent.

It is an ancient maxim, that in law a day is like a mathematical point, admitting of no fractions — such is the general rule; but there are exceptions, where it is necessary for the purposes of justice to distinguish time with accuracy. Although the law does not in general regard a fraction of a day, yet a day is always considered divisible for the purposes of justice; for fictions of law hold

only in respect to the ends and purposes for which they were invented, *Morris* v. *Pugh*, (3 Burrows, 1241.)

In *Coule* v. *Pitt*, (3 Burrows, 1434) Lord Mansfield observed: "But though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And *I do not see why the very hour may not be so too, when it is necessary and can be done:* for it is not like a mathematical point, which cannot be divided." In consideration of law, there is priority of time in an instant, as it may be divided into two parts. Co. Litt. 185–6.

The court will notice a fraction of a day in administering the bankrupt law. Where the question was between an assignee and attaching officer, which should hold certain property of the bankrupt, the court ruled that the exact time of the attachment and of the act of bankruptcy might be shown, which was first in point of fact, though appearing of record to be of the same day. *Thomas* v. *Desanges*, (2 B. & A. 586); *Saddler* v. *Leigh*, (4 Camb. 197); *Stead* v. *Gascoigne*, (8 Taunt. 527; 8 Ves. 80.)

In Massachusetts, the day, hour and minute of recording deeds, and of making attachments of real estate, are made matter of record. Rev. Stat. ch. 90, sec. 20; ch. 59, sec. 24.

In private instruments to take effect from the day of the date; the day of the date may be taken inclusive or exclusive, according to the subject matter, and so as to effectuate the intention of the parties. *Pugh* v. *Duke of Leeds*, (Cowp. R. 714.)

As the bankrupt act was remedial, it may perhaps be fairly inferred that it was the intention of congress that the repealing act should not take effect until after the 3d of March, 1843, exclusive.

In point of fact the bankrupt act of August 19, 1841, was in force when the petition in this case was filed, and that fact cannot be altered or done away with by any legal fiction or relation. If the repealing act defeats the petition in this case, it does so by a retrospective operation. Statutes are to be considered prospective, and not to prejudice or affect the past transactions of the subject, especially where it would tend to produce injustice or inconvenience. *Whitman* v. *Hapgood*, (10 Mass. 437.)

Perhaps it will be asked, can the repealing act be good for any part of the 3d of March, and not for the whole day? I answer it can, unless reasons of public policy or expediency forbid the inquiry as to the exact time when an act received the approbation and signature of the president. To subject the president to an inquiry as to the exact time when he signed a bill is certainly very objec-

tionable; and other inconveniences will readily suggest themselves as being likely to occur if the executive could defer the operation of an act until the last minute of the day on which he should sign it. But all these considerations must give way to the demands of justice, or to the just requirements of the constitution.

The language of the constitution of the United States, is somewhat peculiar on this subject. Const. of U. S. art. I. sect. 7 — "Every bill which shall have passed the house of representatives and the senate shall, *before it become a law*, be presented to the president of the United States, if he approve, he shall sign it, but if not, he shall return it, &c.; if approved by two thirds of both houses by yeas and nays entered upon the journal, it shall become a law — if not returned within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, &c. Every order, resolution or vote, &c., shall be presented to the president of the United States, *and before the same shall take effect, shall be approved by him, &c.*" *Can an act, after it is approved and signed by the president, by legal relation take effect, become a law, and be in force prior to such approval and signature, without violating the express language and intention of the constitution?* And the question is, can an act not approved nor signed by the president until ten o'clock at night on the third of March, render void this proceeding in bankruptcy which was commenced about noon on the same third of March, when the bankrupt law was in full force and operation; especially as the repealing act expressly saves all proceedings in bankruptcy commenced before the passage of that act? An affirmative reply to this question cannot be given upon any other ground than that the law in such cases as this admits of no fractions of a day.

In the matter of Howes, in Vermont, (6 Law Reporter, 297.) Prentis, justice, decided that a petition filed on the third of March was too late, and that the court could take no order upon it except to dismiss it. In New York, petitions filed on the third of March have been received and proceeded in to their final consummation.

There is a general principle, running through all our American constitutions, that no bill or act shall become and have the force of law until certain formalities, which are in the nature of checks and restraints, have been complied with; and the inference I would draw from that fact, is, that it is contravening the policy of our written constitutions to allow an act to have the force of law, by relation even for that portion of the day of its passage, which has transpired before all the constitutional requisites have been actually fulfilled. Constitution of Mass. ch. I., sec. 2 — No bill or resolve of the senate or house of representatives shall become a law, or

have force as such *until* it shall have been laid before the governor for his revisal: and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same, &c.

The question whether the district court has jurisdiction over the petition in this case, is a difficult one, and I am not able to satisfy my mind fully which way it should be decided. Common sense, the facts in the case, and the language of the constitution seem to go in favor of the jurisdiction, although a decision to that effect might lead to the practice of noting the hour and minute of the passage of an act, instead of merely noting the day, as is now the practice; — or it might lead to a better practice still, that of making all laws to take effect from some fixed and future day, thereby giving the people a chance to know the laws by which they are to be governed before they have unwittingly transgressed them.

Story J. The present question embraces some novelty as to the interpretation of statutes, and the time of giving them effect. It appears, from the statement of facts, that the petition in this case for the benefit of the bankrupt act of 1841, ch. 9, was filed on the third day of March, 1843, about noon; and that the act of third of March, 1843, ch. 82, repealing the bankrupt act, passed congress, and was approved by the president, late in the evening of the same day. The language of this last act is, "That the act entitled 'an act to establish a uniform system of bankruptcy throughout the United States,' approved on the 19th day of August, 1841, be, and the same is hereby repealed." There is a proviso, "That this act shall not affect any case or proceeding in bankruptcy commenced before the passage of this act." Now, upon this posture of the case, the question arises, whether the repealing act took effect by relation, from the commencement of the third day of March, 1843; or, whether it took effect only from the act of approval by the president, on the evening of the same day. If the former be the true, legal interpretation, then the district court had no jurisdiction to entertain the petition; if the latter be the true intendment of law, then the district court had a clear jurisdiction in the premises, and the jurisdiction having once attached, the proviso saves all farther proceedings under the petition.

I am aware, that it is often laid down, that in law there is no fraction of a day. But this doctrine is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and, therefore, like all other

legal fictions, is never allowed to operate against the right and justice of the case. On the contrary, the very truth and facts, in point of time, may always be averred and proved in furtherance of the right and justice of the case; and there may be even a priority in an instant of time; or in other words it may have a beginning and an end.[1] The common case put to illustrate the doctrine, that there is no fraction in a day, is the case, when a person arrives at majority. Thus, if a man should be born on the first day of February, at 11 o'clock at night, and should live to the 31st day of January, twenty-one years after, and should at one o'clock of the morning of that day make his will, and afterwards die by six o'clock in the evening of the same day, he will be held to be of age, and his will be adjudged good. Here the rule is applied in favor of the party, to put a termination to the incapacity of infancy. The case of *Fitzhugh* v. *Dennington*, (2 Ld. Raym. R. 1094; S. C. 6 Mod. R. 260; 1 Salk. R. 44,) fully supports this doctrine, and it stands recognised and confirmed in other cases.[2] But, many cases may easily be put, where the real fact is allowed to prevail, and to be conclusive. Thus, for example, if a woman makes a deed of her land in the morning, and is afterwards married, or dies on the same day, the deed is good. So, if my ancestor die at five o'clock, in the morning, and I enter into his lands at six o'clock, and make a lease at seven o'clock of the same day, the lease is good. So, if the ancestor, and his immediate heir, both die on the same day, and the inheritance would pass to different persons, according to the survivorship of the ancestor, or the heir, then, the actual fact, which survived the other, may be proved, so as to pass the inheritance to the proper party entitled thereto. Nay, the question of survivorship, may often, in the absence of direct proof, be decided by mere presumption, from age, sex, constitution, and other circumstances, where both perish by the same common calamity, as by the foundering of the ship, at sea, in which they are both embarked. In short, the true doctrine, upon this whole subject, is laid down in *Roe* d. *Wrangham* v. *Hersey*, (3 Wils. R. 274,) where the court said; "It is said, that there is no fraction in a day; but this is a mere fiction in law; *fictio juris neminem lædere debet;* but avail much it may. And

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[1] See Digger's case, 1 Co. R. 174; Fitzwilliam's case, 6 Co. R. 33, Co. Litt. 135, a. Viner Abridg. Time. A 3, pl. 7.

[2] See Com. Dig., Infant, A. Roe *v.* Wrangham, (3 Wils. R. 274); Herbert *v.* Turbell, (1 Keble R. 58); Siderf. R. 163, pl. 18, (Anon. 1 Ld. Raym. 480.)

this is seen in all matters, where the law operates by relation, and by division of an instant, which are fictions in law." And, after putting various other illustrations, the court added; "by fiction of law, the whole time of the assizes, and the whole session of parliament may be, and sometimes are considered as one day; yet the matter of fact shall overturn the fiction in order to do justice between the parties." [1] In *Combe* v. *Pitt*, (3 Burr. R. 1423, 1434,) Lord Mansfield approved a similar doctrine, and said; "But, though the law does not, in general, allow of the fraction of a day, yet it admits it in cases, where it is necessary to distinguish. And I do not see, why the very hour may not be so too, where it is necessary, and can be done; for, it is not like a mathematical point, which cannot be divided." So that we see, that there is no ground of authority, and, certainly, there is no reason to assert, that any such general rule prevails, as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purposes of substantial justice. Indeed, I know of no case, where the doctrine of relation, which is a mere fiction of law, is allowed to prevail, unless it be in furtherance and protection of rights, *pro bono publico*.

But it appears to me, that the doctrine assumes a broader importance, under the constitution and laws of the United States.

By the constitution of the United States, "every bill, which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve it, he shall sign it; but, if not, he shall return it, with his objections, to the house in which it shall have originated," &c. &c. Now, it seems to me clear, from this language, that in every case of a bill, which is approved by the president, it takes effect as a law only by such approval, and from the time of such approval. It is the act of approval, which makes it a law; and, until that act is done, it is not a law. The approval cannot look backwards, and, by relation, make that a law, at any antecedent period of the same day, which was not so before the approval; for the general rule is, *Lex prospicit, non respicit*.[2] The law prescribes a rule for the future, not for the past; or, as it is sometimes expressed, *Lex dat formam futuris, non preteritis negotiis*. And this, in a republican government, is a doctrine of vital importance

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[1] See Com. Dig. Temps. c. 8.

[2] Branch's Maxims, p. 99, Jenkins's text, 284.

to the security and protection of the citizen. It is fully recognised in the constitution itself, which declares, that no ex post facto law shall be passed. Put the case, that a statute, passed on the 3d of March last, which created and punished as public offences certain acts, which were not so before the passage of the statute; and the statute was approved at eleven o'clock at night; and an act was done, in the preceding part of the day, which was innocent at the time when it was done; could it be contended, that the party would be punishable therefor by relation; or that it was not within the prohibition of the constitution, as an ex post facto law, so far as it operated upon his case? If it should be said, that the law does not recognise any fractions of a day, why may we not deem the law in force only from the last instant of the day, instead of carrying it back, by relation, to the first instant of the day? If there be any choice, as to the principle of interpretation, one should think, that that ought to be adopted, in cases of this sort, which is most favorable to private rights and public justice. Surely the constitution is not to be set aside, or varied in its intendment, by mere legal fictions. On the contrary, it appears to me, that in all cases of public laws, the very time of the approval constitutes, and should constitute, the guide as to the time, when the law is to have its effect, and then to have its effect prospectively, and not retrospectively. It may not, indeed, be easy, in all cases, to ascertain the very *punctum temporis;* but that ought not to deprive the citizen of any rights created by antecedent laws, and vesting rights in them. In cases of doubt, the time should be construed favorably for the citizen. The legislature have it in their power to prescribe the very moment, *in futuro*, after the approval, when a law shall have effect; and if it does not choose to do so, I can perceive no ground, why a court of justice should be called upon to supply the defect. But, when the time can be accurately and fully ascertained, (as in the present case) when a bill was approved, I confess, that I am not bold enough to say, that it became, by relation, a law at any antecedent period of the same day. I cannot but view such an interpretation as at war with the true character and objects of the constitution.

Upon the whole, my opinion is, that the question adjourned into this court by the district court, ought, upon the statement of facts, to be answered in the affirmative; and that the district court had jurisdiction of the present petition at the time when it was filed and acted upon; and that it has full jurisdiction to entertain all proceedings thereon, to the close thereof, according to the provisions of the bankrupt act of 1841, ch. 9.

Supreme Court of Pennsylvania, September Term, 1843.

LOGAN AND KENNEDY *v.* MASON AND DILWORTH.

The provision of the Roman law which, in the application of a payment, requires the creditor, when the right has devolved on him by the laches of the debtor, to consult the debtor's interest in preference to his own, has not been adopted as a part of the common law; and the propriety of an instant and actual application, by a creditor firm, of the proceeds of a separate note transferred to it generally as collateral security, without specifying for what debt, by a partner indebted to it on joint and separate account, cannot be questioned.

IT appeared, by a case stated in the district court of Alleghany county, that the defendants, Mason and Dilworth, were indebted, at the dissolution of their partnership, on the 27th June, 1839, to the plaintiffs, Logan and Kennedy, who held their bills and notes for about two thousand dollars. Mason, who continued the business, and Owens, his surety, contracted with Dilworth, who retired, to pay the partnership debts. Mason continued to deal with the plaintiffs on his own account till the fourth of December, 1839, when he was indebted to them, including a small bill he owed them at the dissolution of the partnership, in the amount of two hundred fifty-nine dollars and seventy-nine cents. On the 25th November, 1839, he transferred to them a note drawn in his favor by Johnson, which was no part of the joint effects, for five hundred and fifty dollars, as collateral security, without specifying for what debt. He made a general assignment on the 19th of January, 1840; preferring Owens as his surety; and was discharged as an insolvent debtor on the 23d March, 1840. On the 13th of May, 1840, Logan and Kennedy applied the proceeds of the note, by an entry on their books, to the debt due from Mason on separate account in the first instance; and the residue, to the debt due by Mason and Dilworth. Owens subsequently satisfied all the partnership debt except the part of it which he insisted ought to have been paid out of the proceeds of the note; and it was agreed, if the court should be of opinion that the plaintiffs had a right to apply the proceeds of the note to Mason's separate debt, judgment should be rendered in their favor for the two hundred fifty-nine dollars and seventy-nine cents; otherwise for the defendants.

The court gave judgment for the defendants; and on a writ of error to this court, *McCandless*, for the plaintiffs, cited 1 Wash. R. 133; 4 Cra. 320; 9 Wheat. 724; 5 Peters, 168; 29 Eng.

C. L. R. 25; 30 Eng. C. L. R. 286; 35 Eng. C. L. R. 78; 2 Hall, 197; and 4 Gill and J. 372.

Eyster, for the defendants, relied on *Harker* v. *Conrad*, (12 Serg. and R. 301); *Gass* v. *Stinson*, (3 Sumner R. 110), and the American Law Magazine, No. 1, Art. 2.

Gibson C. J. If anything has been settled by decision, it is that the right to apply a payment without restriction as to anything but the time, devolves on the creditor in default of application by the debtor; and I feel myself so bound by it that were I ever so well convinced of the superior excellence of the rule of the civil law, I could not adopt it. I know not how an English or an American judge can strip an adopted rule of its common law emendations merely because they were originally no part of it. It has become the law of his court, not by virtue of any inherent obligation in it, but by force of precedent; and the same force which was competent to adopt it, was equally competent to establish the parts that were added to it. If the courts were to discard them now, the law of contracts, of testaments, of donations *causâ mortis*, of guardian and ward, and, in short of the whole mass of movable property, would be thrown into hopeless confusion by it, followed by instability of decision, the worst curse that can befall a people. Notwithstanding the admitted excellence of the Latin code, the English judges were constrained to alter almost every part of it which they introduced into the body of the common law, in order to fit it to modern use; and the continental states, who profess to have received it entire, followed only to a less extent the footsteps of their more commercial neighbors. These alterations were indispensable in order to make the jurisprudence of the day keep pace with the changes in the affairs of men wrought by the lapse of a thousand years. Yet, encouraged by an article which appeared in the American Law Magazine (No. 1, Art. 2) and by the authority of Mr. Justice Story, in *Gass* v. *Stinson*, (3 Sumner R. 110), the district court have disregarded an actual application by the creditor in due season, though there had been no application by the debtor. For everything that comes from Mr. Justice Story, I feel a deferential respect; and had not the weight of his name been thrown into the scale, I should not have felt myself called on to vindicate the rule of the common law. But in saying that as regards the application of payments, the Roman law is more rational and consonant to the presumed intention of the parties than the common law; that it is equally simple and convenient; and that it is, or ought to be, the law of the subject in this country, — it seems to me that partiality

for his favorite code has carried him too far. In the American courts the question is not an open one; and it would require some intolerable mischief — certainly more than our equality in point of simplicity, convenience, and reasonableness — to justify us in overturning the decisions of more than two centuries. Were we called on to engraft a new principle on the common law stock, without lopping a branch to make room for it, I would certainly do as Lord Mansfield did in laying the foundations of the English commercial law — I would take it from what he, perhaps justly, called the first collection of written reason that ever existed. Its fault, if it has one, is in aiming to do too much by attempting to give effect to equities which are too subtle to be dealt with by a human tribunal; at least by one encumbered with a jury. There is, however, no such equity in the case before us.

It is agreed that the application of a payment belongs to the debtor in the first instance; and that, in default of application by him, it devolves on the creditor. So far the Roman law and the common law march together. But the Roman law has this extraordinary proviso, that the creditor make the application as he would do were he the debtor; and any other application by him would go for nothing, on the ground that his act is consonant to the presumptive wish of the parties only when it is most beneficial to him who paid. It is scarce necessary to say how unfounded is such a presumption in experience, which is the mother of presumptions. It certainly is a narrow basis for a moral duty. Why should the creditor, standing in no relation of confidence, be expected to take care of the interest of a party who is too supine or indifferent to take care of it himself? Conscience has nothing to do with such a case; for the man who will not exercise his right at the proper time, renounces it. This principle is the foundation of many of our titles. When the land of an intestate has been divided by partition in the orphans' court, the children have priority of choice between the purparties in the order of their seniority and sex; but when the oldest son neglects to choose, his priority passes to the next in order, who is not bound to consult any particular interest in the use of it. No lawyer ever dreamt that an elder son, who had slipped his time, might recover from his younger brother on the ground that his interest had not been sufficiently cared for. Such a pretension would be treated with ridicule. It may be said that this is a judicial proceeding. But if the owner of an earlier descriptive land-warrant, who has a right to have its sales feed out of the best part of the vacant land, and omit to exercise it by having his survey made in due time, he will pass his right to the owner of the later war-

rant, who may then choose for himself without jeopardy his title. And this is a proceeding *in pais*. It will not do to say that this is a principle of local and peculiar law. I know not a more beautiful system, or one more founded in principles of general equity, than the land-laws of Pennsylvania. Why should there be a difference in this respect between the appropriation of land to a particular warrant, and the appropriation of money to a particular debt? A right of choice is essentially exclusive; and if the creditor's power of application is to be controlled by the interest of the debtor, it is no right at all. The exercise of the power devolves on the creditor, either as a right or as a duty. If as a right, it is absurd to say he may exercise it, but only in subordination to the right of another. Yet the Roman law says so, and tacitly admits that its proviso is repugnant to its rule. The writer who champions it in the magazine, goes further, and admits that the proviso seems to be expressed in mockery of the creditor. If however the power devolved on the creditor subject to a duty to make the application in a particular way, he might be compelled to exercise it; but why compel him to go through the form of an application which the law would make without his assistance? That would be a mockery indeed. The well-founded remark of the chancellor of New York in *Stone* v. *Seymour*, (15 Wendell, 26) shows clearly the want of moral obligation in this matter which the Roman law enforced as a duty. As a rule of morals the golden precept to do as we would be done by, ought to bind the debtor as it binds the creditor; yet it is not assumed by that law that the debtor, where he makes the application, is bound to consult the interest of the creditor, though it is a maxim of our own law that equality is equity. But, says the writer in the magazine, this is a mixing up of things quite distinct from each other; for that the maxim, thus commented on, of a code drawn from a remote period of paganism, does not aspire to the character of the golden rule inculcated by our Saviour. To what, then, does it really aspire, that we should be bound to displace the decisions of two hundred years to make way for it? The morality of the New Testament is for all times; and that the maxim cannot endure a test so severe is proof, as strong as holy writ, that there is something wrong in it. And if it is not founded in moral duty, whence comes its obligation? The writer himself claims no such foundation for it, but places it on the pedestal of a sentiment for the poor debtor. The sentiment, however, would be ill-bestowed on the debtors of our day; for the poor man is not so often in debt as the rich one, by reason that he cannot so easily get credit. The capitalists are the luxurious consumers, the great

purchasers, the great traders, the great manufacturers, the great borrowers, and consequently the great debtors. Nor does sympathy for the destitute give tone, as the writer supposes, to either our legislation or our jurisprudence. In no country is the power of wealth more oppressively exerted, than in our own. Witness our unequal taxation, which favors the land-holders, and casts the public burthens on the feeble and defenceless, who have no refuge from power but complaint; and witness our stay-laws, and relief laws, passed avowedly for the protection of property. Witness, too, the impunity granted to banking companies. The really poor debtor has no need of these. He has no land, no complicated dealings to involve him, in debt on distinct accounts; he makes no payments, and is indifferent to priorities of application. His refuge is the insolvent law which makes his creditor his slave. As respects jurisprudence, I am proud to say the bench has not disgraced itself by forgetting the scriptural precept: "Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty." (Liviticus, ch. 19, verse 15.) The provision of the Roman law then has not even this same anti-scriptural sentiment to give color to it; and the only thing else which the writer seems to claim for it, is that it is not altogether impracticable. The seductive facility of application, which he charges against the rule of the common law as a defect, might perhaps be placed on the other side of the account. But the true cause that there is priority of application at all, is not the supposed merit or misfortune of the party, but necessity. It must be vested somewhere; and the common law vests it in the debtor, because, in the transaction of payment, he takes the first step. If election is given of several things, says Lord Coke (1 Inst. 144) he shall have it who is the first agent, and ought to do the first act. If, as I conjecture, the rule of the Roman law had the same origin, its sentiment is no better founded than its morality.

The rule of the common law seems better found in both reason and convenience. Its facility of application is a great and an original praise. Who can tell how a debtor would have his payment applied? Probably not the debtor himself, if his interest were so balanced as to make him indifferent to the event; and if it were not, he would take care to give the proper direction at the proper time. How could the creditor decide for him, if he could not, or would not, decide for himself? He might call on the debtor for instructions; but then the application might happen not to be the act of the creditor, except as the debtor's puppet, and the creditor's privilege would thus be deceptive. Though he should have acted

in good faith, yet if the judge should think he had erred in his belief that the application was the best that could be made for the debtor, it would go for nothing. It is plain, therefore, that the right of application held out to the creditor by the Roman law, is illusive. It is a solecism to call it a right, if it is not an independent one. And when the judge would come to correct the creditor's error, he would be bewildered with the same distracting considerations which misled the creditor in the first instance, and which have led to the conflict of decision in the English and American courts, complained of by the writer, where there was no actual application by either party. But nothing is more easy than to determine whether there was an application in fact, when the money was received. There has doubtless been inconsistency of decision as to the period allowed for the creditor's election; but the inconvenience from it will not be a durable one. The reasonableness of notice to the drawer of a bill, or the indorser of a note, was for a time determinable by no definite rule; yet it is now susceptible of legal certainty; and it would be just as easy to find a rule for the time of application. The case before us stands clear of difficulty on that head, and I pretend not to lay down such a rule authoritatively; but I take it that the entry or memorandum of the application ought to be of a date so early, as to raise a presumption that the act of application was simultaneous with the act of reception, and not the consequence of an after-thought. It seems to be the better opinion, that an application by either debtor or creditor, must be part of the *res gesta*, the difficulty being to fix the point of time beyond which the entry or memorandum of it shall not be delayed. It would seem reasonable to put it on the footing of a charge in a book of original entries, which must appear in its place among the transactions of the day, and to have been made the same evening or the day following. Such a rule would be certain, to a convenient extent. But, notwithstanding the admitted discrepance of the decisions as to time, it would occasion much greater discrepance to refer the propriety of an application to the law.

When the debtor, in this case, assigned the note to the defendants as collateral security, he was silent as to the application of the proceeds of it; and if he desired to have it placed to a particular account, it was his business to say so at or before the time when the money was received. The creditor's firm applied at the moment, and the case is unembarrassed by any consideration of the time: so that we have before us the naked question, whether an application by a creditor can be opened to let in the equity of a surety, or the presumptive intention of the debtor. In *Harker* v. *Thorne*,

(12 Serg. & R. 305) cited for the affirmative, there was no such application; and the remarks of the court were predicated of a very different case. Were there not an actual application, in the case for decision, I certainly would not contest the positions of the district court. The equity of a surety may enter into an open case, as it enters into a case of substitution, in which it is treated as matter resting on the basis of benevolence, but not suffered to affect the legal right of a third person. But actual application at the proper time gives a legal right; and the equity of a surety, or the presumptive intent of the debtor, shall not disturb it.

The case of *Dickinson College* v. *Christ*, (1 Watts & Serg. 464) which has been mixed up with the discussion, has been strangely misunderstood. The question was, whether there had been evidence, to be left to the jury, of an actual appropriation to a previous account, in order to entitle the plaintiff to retract a credit given on the face of the claim, which was filed as the groundwork of the lien. The defendant prayed direction that "the payment of four hundred dollars, having been credited on the account of materials furnished for said building, the price of which was a lien thereon, could not be withdrawn and applied (to an account for materials furnished) to any other building." It is known that these prayers are frequently founded on the assumption of facts contested, and sometimes unsupported by, evidence; and the doubt was, whether the question of previous and inconsistent appropriation was raised by the evidence at all. The court thought it was, and left it to the jury "to determine whether it *was* [to be] so applied." Now, retain the words in brackets, and the sentence is unintelligible; strike them out, and the meaning is clear. Their insertion was probably occasioned by a blunder of the person who copied the record, in making up the paper-book; and they passed through the press without correction, no doubt, because the reporter in the country, who made up the case, committed the correction of the proof-sheets to his colleague in town, who was less familiar with the details of it. The judge who delivered the opinion of the court, when the cause was here on a writ of error, disposed of the point by saying, that though the testimony ought to be scanned with great severity, there was no error in leaving the fact to the jury; and though the point is obscurely stated, it might readily have been perceived that it was the fact, and not the law, which had been thus left. The truth is, the point was raised by one of those exceptions which are habitually thrown in, as make-weights to multiply the chances of reversal; and it was so obviously untenable, that it was but fairly pressed at the argument. The decision was not intended to be a

precedent for anything out of the case; and that the point was noticed at all, was, because there is a statute which requires us to decide every exception taken below, and because the matter was to be sent to another jury. The reporter did not expunge it, I presume, because he did not consider himself at liberty to mutilate an opinion of the court. This explanation, it is hoped, will prevent the case from being misunderstood for the future.

Judgment for the defendants reversed; and judgment on the case stated for the plaintiffs.

Herr's Appeal.

Where a gift by a husband to his wife is reasonable, and not in fraud of creditors, equity sustains it as a provision for her, to which the interposition of a trustee is not indispensable; but such gift must be established by clear and convincing proof, not only of the act of donation and delivery, but of her separate custody of it.

This case came before the supreme court of Pennsylvania by appeal from the decree of the orphans' court, settling the account of Frances Herr, administratrix of Samuel Herr, deceased. The accountant, who was the widow of the deceased, charged herself with the amount of the inventory of the personal estate of the intestate, being about thirty-five thousand dollars. The heirs at law excepted to the account, for the reason that the accountant had not charged herself with the sum of four thousand five hundred dollars, cash, on hand at the death of the intestate, which was not included in the inventory. The fact of the existence of the four thousand five hundred dollars was not denied by the accountant; but she contended, that she was not chargeable with it, inasmuch as it was a gift, in the nature of a provision for her, made by her husband in his lifetime. And to sustain this position, the proof was, that for a number of years before his death, Samuel Herr, the intestate, had been hoarding all the specie which came to him, in the course of his business; and frequently he was heard to say, that it was his wife's. He was an intemperate man, and without children; and proof was made of his declarations, that his kindred should not have his property at his death; that this money was kept in a particular room and drawer, of which the key was in the custody of his wife, and although he had frequent access to the same, it was always to add to the store, and never to take from it. At one time he promised to loan a sum of money to

a friend, and being disappointed in getting it from other sources, he declined using the money in question, saying, he had nothing to do with it; that it was his wife's; and went and raised the money by putting his note into bank. It was also in proof, that when in fits of intoxication he treated his wife badly.

The court below was of opinion, that these declarations and acts of the husband were not sufficient to vest the right to the money in his wife, and charged her with the same. From this decree she appealed.

The question was argued in this court by

Montgomery and *Stevens* for the appellant.
Reigart and *Parke* for the appellee.

Gibson C. J. Such a gift as this would certainly be void at law; for not only is the wife's capacity to contract with her husband extinguished by the merger of her legal existence in his, but, as her possession is in contemplation of law his possession, she is incapable of receiving from him that delivery and transfer of it, which is essential to this species of contract. But, where the gift to the wife is reasonable and not in fraud of creditors, equity sustains it as a provision for her, to which the interposition of a trustee is not indispensable; yet in consideration of the facility with which evidence of it may be fabricated, resting, as it usually does, in the testimony of witnesses domesticated in the family, and tinctured with the prejudices and partialities of its members, a chancellor exacts clear and convincing proof of the act of donation and delivery, followed by the same custody which a wife has of her wardrobe or the ornaments that belong to her person; in fine, distinct proof of what would constitute a gift to any one else. In a case of the first impression, such as the present happens to be with us, it is excusable to reassert these text-book principles as the law of the court.

That the coin in question was set apart from the husband's bank-notes, which he treated as his proper money by locking them up in his desk and keeping the key, has not been denied; at least the fact is borne out by every part of the evidence. This coin was kept in the lower part of a double-bottomed chest, of which the wife kept the key, but to which the husband had access at those times when he visited it to increase the hoard. What more decicive badge of ownership and possession could there be? It is true, he went to the chest indifferently, when she was present and when she was absent; but to have watched him on these occasions, she may have thought, would have evinced an unnatural distrust of one

whose acts were intended to benefit her; for, though he often put money into it, no witness speaks of having seen him take any out of it. That the parties lived on these terms of unreserved confidence, is a circumstance which corroborates the direct evidence of the gift; and that the husband had occasional access to the chest, is not more inconsistent with the wife's possession, than the same sort of access would have been to the place where she kept her apparel. In *Northey* v. *Northey*, (2 Atk. R. 77) when the question was whether certain jewels were part of the wife's paraphernalia, and, consequently, whether she had retained them in her possession during the husband's life, it was decreed for her, in proof that she had worn them six weeks before his death, and after he had specifically bequeathed them away from her, though he had kept them locked up in his bureau, where they were found by his executor, his custody being deemed her possession. That is a much stronger case than the present, in which the room door was kept locked by the same key, and in which the wife's general possession is proved by two uncontradicted witnesses.

The evidence of donation rests on the testimony of witnesses, who prove, not only the husband's declarations of the fact, but acts done by him in conformity to it. Naked declarations of the sort, are of less account than acts which, by reason of their greater notoriety, are less easily misrepresented or misunderstood. Such declarations are sometimes made for the sake of peace; sometimes with a view to future events; and sometimes with no definite purpose whatever, as where a horse, or anything else, is designated as the property of the wife or a particular child; these are idle or unsettled indications of an intended disposition, to which it would be rash to give the effect of proofs. But where they are found to have been acted on as the basis of a fixed determination, they assume a very different aspect. In the case under consideration, the husband kept his own money under lock and key, using it exclusively in the course of his business, and letting no necessity, however pressing, break in on the destined provision for his wife. And so sacred did he consider it, that rather than touch it at his utmost need, he raised money on his note put into bank for discount — a last resource, to which he had evinced, on other occasions, a peculiar repugnance. In lending or paying he parted with no coin; but contrived rather to get it in change, avowedly to increase the cherished store. Now to explain the drift of this, his several declarations to five different witnesses — that the coin was the money of his wife, and that it was collected for her separate use — as well as his declaration to others, that his kindred should

not have his property at his death — come into the case with decisive effect. He was childless; and the gift was, not only a natural, but a proper one. This evidence would be sufficient proof of a gift to a stranger; then why not proof of a gift to one standing in a relation so intimate?

The appellees oppose to it the improbability of such a thing from a husband who is proved to have abused her, when he was drunk, with words and blows. Had it been proved that he did so when he was sober, there would have been matter in it; but the very consciousness of his brutality may have led him, in his moments of sobriety, to make the provision he did, in atonement of her wrongs; so that this feature of the case, rather strengthens the evidence of the gift than weakens it. It is in proof that he treated her well when he was sober; and though drunkenness commonly transforms a civilized man into a savage, and a kind husband into a beast, the transformation seldom survives the debauch that occasioned it. The proof of its occasional occurrence, in this instance, is not enough to overbear the positive, distinct, and full proof of the fact it is adduced to encounter. The item of four thousand five hundred dollars, charged as part of the husband's estate must be struck out, and the decree affirmed for the residue.

Supreme Judicial Court, Maine, October Term, 1843, *at Bangor.*

PEARSON AND ANOTHER *v.* CROSBY AND BARKER, TRUSTEE.

An assignment, made in pursuance of the statute of Maine, of April 1, 1836, provided only for such creditors as should consent to discharge the assignor from all claims and demands. *Held*, that this condition rendered the assignment void.

IN this case, the supposed trustee claimed to hold the estate of the defendant, under an assignment to him by the defendant, under the statute of Maine, of April 1, 1836. The assignment, in effect, provided only for such creditors as should consent to discharge the assignor from all claims and demands. The case came up on exceptions filed on the part of the plaintiffs, to the decision of the district court, discharging the trustee.

Hobbs, in support of the exceptions, argued, that the assignment was void at common law, because it contained a release to the debtor, and cited the case of the *brig Watchman*, (Ware's R. 246).

He also contended, that this was not a statute assignment, within the meaning of the statute of April 1, 1836, concerning assignments, that statute requiring a general distribution among all the creditors who should become parties within three months, and not providing for any release.

Moody, for the trustee, argued, that the law was well settled in Massachusetts and Maine, that a condition of release did not invalidate an assignment, and cited *Halsey* v. *Whitney*, (4 Mason R. 206); *Hatch* v. *Smith*, (5 Mass. Rep. 42); *Fox* v. *Adams and Trustee*, (5 Greenl. R. 245); *Canal Bank* v. *Cox and Trustees*, (6 Greenl. R. 395; *Todd* v. *Bucknam*, (2 Fairfield R. 45). He also contended, that such a provision was in no respect inconsistent with the statute of 1836. That act did not embrace, and was not intended to embrace the whole law of assignments, nor purport to remodel the law on that subject. Its title sufficiently showed this, which was "an act concerning assignments." The objects of the state were manifest, and seemed to leave no room for doubt or dispute. They were few — they were specific, and clearly expressed — and no room was left, in any general terms of the act, for inferring any other objects not specifically mentioned. The main purpose of the act, evidently, was to prevent for the future those preferences of certain debts, before so customary in assignments. It therefore first provides for an equal distribution of the assignee's property, among such of the creditors as should become parties within a certain time. (2.) It gives the creditors three months to become parties. (3.) It requires a publication in a newspaper. (4.) It demands an oath to the truth of it, from the assignor, and his acknowledgment before a magistrate. (5.) It forbids attachments upon the property assigned, and trustee processes against the assignee for the period of three months. These are the provisions, and the *only* provisions of the act. These, therefore, are the objects, and the only objects, if we can judge by their language, which the legislature had in view. As to any and every other matter of the law of assignments, the statute is wholly silent. Whatever else is grafted upon it, must be without warrant from its words, and by an inference not justifiable by anything it contains. The assignment in this case, literally complies with every provision before mentioned.

The act makes void — what? Not surely such assignments, as, complying with its requisites in all respects, contains other provisions not inconsistent with those; but those which fail to comply with any one of its provisions. The statute says, in substance, whatever other provisions an assignment may contain, these that are

enumerated it shall contain, and it says no more, according to any known rules for interpreting language. To say that this assignment is void for this cause, would be to vitiate it, because it is inconsistent with a provision nowhere to be found in the act — a provision, too, itself inconsistent with well-settled common law.

The other facts in the case, sufficiently appear in the opinion of the court, which was delivered by

WHITMAN C. J. Barker, the supposed trustee, claims the estate of the defendant under an assignment to him, made by the defendant, and, as he contends, in pursuance of the statute concerning assignments, of the first of April, 1836. The plaintiff contends, that the assignment is not in conformity to the provisions of the statute, and is therefore void. The assignment, in effect, provides only for such creditors as shall consent to discharge him from all claims and demands, except so far as they can realize any portion thereof, under the provisions of the assignment. The question is, did this condition render the assignment void? Before the passage of the above statute, it had been adjudged, in this state, that it did not. *Todd* v. *Bucknam*, (2 Fairf. R. 45). We are now called upon to determine, whether, under the statute, our adjudication should be otherwise. There had been much diversity of opinion on the question, among jurists, before the passage of the statute. The learned judge of the United States district court, had intimated very distinctly, that such a condition in any assignment, rendered it void under the statutes of the 13th and 27th of Elizabeth. (Ware's Rep. 232.) And Mr. Justice Story, in *Halsey* v. *Fairbanks and trustee*, (4 Mason, 206), in the absence of adjudications and usage in Massachusetts to the contrary, would seem to have been strongly inclined to the same opinion. And in New York, the decisions on the point are opposed to those in Pennsylvania. Under the provisions in the before-named statute of 1836, such a condition in an assignment seems to us to be wholly inadmissible. That statute provides, that all assignments, made by debtors in this state, for the benefit of their creditors, shall provide for an equal distribution of all their estate, real and personal, among such of their creditors, as, after notice as therein provided, shall become parties to the same, in proportion, &c. Thus, but one condition is prescribed, and that is, that the creditors upon being notified, shall become parties thereto within three months. It is not that they shall become parties thereto, and release the debtor from further claim, within three months. A full discharge of the debtor does not seem to have been in the contemplation of the legislature. A distribution of the

debtor's effects *among all his creditors*, without restriction or distinction, seems alone to be provided for. To bring the assignment within the statute, it must conform to its terms, when those terms are, as they seem to be in this instance, explicit and clear. And the statute is equally clear and explicit, that if it does not, it will be void. We are therefore of opinion that the exceptions should be sustained, and that the trustee be chargeable.

Supreme Judicial Court, Massachusetts, October Term, 1843, *at Worcester.*

SLATER *v.* RAWSON.

If a grantor, in possession of lands, convey the same with a covenant of warranty, such covenant takes effect and will run with the land, although, at the time of making such deed, the legal title to a seisin of the lands be in a third person.

THIS was an action of covenant broken, upon an alleged breach of covenant of warranty, contained in a deed of certain real estate, made by the defendant to one J. S., from whom the plaintiff derived title by sundry mesne conveyances. The breach alleged was, that a part of the premises so conveyed to J. S., then belonged to one Jacobs, who had since entered and dispossessed the plaintiff. [The facts are fully stated in 1 Metcalf, 450, where a new trial was ordered.] In the new trial, it appeared that the premises consisted of woodland, not inclosed by any fence, and that the defendant, before making his deed, had, at different times, for several years, cut wood and timber upon parts of the premises which belonged to said Jacobs.

The defendant contended, that if he had no title to the premises when the same were conveyed to J. S., no estate passed by his deed; and, therefore, that the plaintiff, having derived his title by intermediate conveyances from J. S., could not maintain an action upon the covenant of warranty in said deed.

Allen and *Bacon* for the plaintiff.
Washburn for the defendant.

WILDE J. delivered the opinion of the court, to the effect, that if the defendant was *in possession* of the estate, when he made his

deed, his covenant of seisin was not broken; and that a seisin thereby passed to J. S., so far that the defendant's covenant of warranty took effect, and passed with the estate to the plaintiff, by the deeds from J. S. and others, through whom he claimed; and that the plaintiff was entitled to recover thereon. That the defendant's acts of possession here, did not constitute a disseisin of Jacobs, the land being wild and unenclosed; and the mere entry, and cutting timber from time to time, not being such acts as of themselves to give notice to the owner of a disseisin being intended.

The court, in this connexion, commented upon the case of *Langdon* v. *Potter & al.*, (3 M. R. 215,) and held, that the doctrine therein laid down, that there could not be "*a concurrent seisin* of lands," although there might be a "*concurrent possession*," was not correct to the extent therein expressed. The court also commented upon the case of *Marston* v. *Hobbs*, (2 M. R. 433,) and so far qualified the opinion of the court, as therein given, that in all cases, if a grantor is in *possession* of lands, he may convey them with covenant of warranty, and that, in such cases, his covenant of warranty would take effect, and would run with the land.

Brigham *v.* Winchester.

The defendant, claiming land under a deed of the ancestor alleged to be void, sold the same by deed, with covenants of warranty, after the ancestor's decease, and received payment for the same. Some time after such sale, the plaintiff, as heir at law of such deceased ancestor, brought his action against defendant for money had and received, to recover the proceeds of the sale. It was *held*, that he could not sustain an action of assumpsit, inasmuch as the title to the real estate was necessarily involved.

The recovery in this action would not amount to a ratification of the purchaser's title, since the defendant did not assume to act as the plaintiff's agent, in making the sale, nor was the plaintiff's right recognised, in making such sale.

Brooks *v.* Twichell.

The defendant gave a note to A. B., payable to him or bearer on demand, who sold and indorsed the same to the plaintiff within two days after it was made. A. B. afterwards called on the defendant to pay him the note, and represented that he still held it; and the defendant, not knowing of such transfer, paid him the

amount of it. It was *held*, that in an action brought by the plaintiff to recover the note, the defendant might give in evidence the payment thus made, in defence, under the provisions of the statute 1839, c. 121, § 1.

George *v.* Second School District in Mendon.

The town of Mendon having elected three assessors, two of them were qualified by taking the oath of office; but the third, when called on, declined to act, and never took the oath of office. The two, thus qualified, proceeded to assess a school-house tax upon the inhabitants of a school district in said town; and, in an action to recover back the amount of a tax so assessed, it was *held*, that there was a legal board of assessors — that two of them, having taken the oath, and having acted, the neglect of the third to qualify himself, and to act, did not invalidate the action of the major part of the board; and that the tax thus assessed was, therefore, a valid one.

The same principle would apply, if one of a board of assessors or select men were to die, during the year for which they were elected. The official acts of the survivors, if a majority of the whole board as originally chosen, would be valid, notwithstanding his decease.

George *v.* Dudley.

Trespass does not lie against an officer, for taking and selling bank stock of the plaintiff, upon an execution against a corporation of which he is a member, although not liable to have his personal property taken on such execution.

Supreme Judicial Court, Massachusetts, January, 1843.

Richardson *v.* Lincoln.

Where the payee of a promissory note, which is in the hands of his attorney, indorses it *bonâ fide* to a third person, and leaves it in the attorney's hands for the use of the indorsee, the attorney thereby consents to hold it for the indorsee, and becomes his agent; and if the attorney bring an action on the note in the indorsee's name, which he sanctions, this is proof of actual transfer, and constructive delivery of the note, though the indorsee never sees it.

Digest of American Cases.

Selections from 4 Metcalf's (Mass.) Reports. Continued from p. 376.

GUARDIAN AND WARD.

A guardian cannot be charged, by the trustee process, for the debts of his ward. *Gassett* v. *Grout*, 486.

HUSBAND AND WIFE.

A woman, before marriage, conveyed to a trustee, with the assent of her intended husband, all the property, real and personal, which she then had, or might acquire after marriage, to be held by such trustee for her sole and separate use, and reserved to herself, in the instrument of conveyance, full power to dispose of all such property, by will or otherwise. After marriage, she purchased and took a deed of real estate, which she, jointly with her husband, conveyed to the same trustee, for her sole and separate use. She afterwards executed her last will, thereby disposing of all the real estate which had been "reserved" by her, and also of all such real estate as she might die seized and possessed of, which she might thereafter purchase. After the execution of the will, she purchased real estate, of which she was the legal owner at her decease. *Held*, that she might lawfully dispose, by will, of all the estate which had been conveyed, as aforesaid, to the trustee, before the will was executed; and that the will ought to be admitted to probate, although the real estate, acquired by the testatrix after the will was executed, might not pass thereby. *Holman* v. *Perry*, 492.

2. The desertion of a wife by her husband, which will enable her to sue, and render her liable to be sued, as a feme sole, must be an absolute and complete desertion, by his continued absence from the commonwealth, and a voluntary separation from and abandonment of his wife, with an intent to renounce, *de facto*, the marital relation, and leave her to act as a feme sole. *Gregory* v. *Pierce*, 478.

3. Where a wife, whose husband had left the commonwealth and remained absent therefrom, is sued as a feme sole, and the question of her liability to be so sued is submitted to the court on an agreed statement of facts, the court will not hold her to be so liable, unless such facts are agreed as show a total renunciation, by the husband, of the marriage relation, or facts from which such renunciation is inevitably to be inferred. *Ib.*

4. A wife, who is divorced from bed and board, and lives apart from her husband, may be sued, as well as sue, as a feme sole. *Pierce* v. *Burnham*, 303.

INSOLVENT DEBTOR.

The United States Bankrupt Act, which went into operation on the 1st of February 1842, did not supersede nor suspend proceedings which were commenced against an insolvent debtor, before that day, under Stat. 1838, ch. 163. *Judd* v. *Ives*, 401.

INSOLVENT ESTATES.

Where the settlement of an estate that is represented to be insolvent is delayed after the commissioners of insolvency have made their return of the claims allowed by them against the estate, and part of such claims are afterwards paid by other parties, or are withdrawn by the claimants, so that the assets in the hands of the administrator exceed the amount of the remainder of the allowed claims, the judge of probate may correct the list of allowed claims, conformably to these facts, and may add interest to the remaining claims from the time of the commissioners' re-

turn to the time of his passing a decree of distribution to the creditors. *Williams* v. *Amer. Bank*, 317.

2. Where a creditor of a deceased insolvent debtor holds property which was pledged to him by the debtor as collateral security with a power of sale, his claim against the deceased cannot be allowed, unless the property is first sold, and the proceeds deducted, or its value is ascertained, by a jury or otherwise, and that value deducted; and the balance only, as thus found, is to be allowed against the deceased's estate. *Middlesex Bank* v. *Minot*, 325.

INSURANCE.

Though a fire insurance company are authorized by their charter to insure property only to the amount of three fourths of its value, yet if they deliberately make a valuation of property, and insure three fourths only of the amount of such valuation, they are bound thereby, in the absence of fraud, collusion or misrepresentation, and cannot show, in an action against them to recover a loss that the property was insured for more than three fourths of its value. *Fuller* v. *Boston Mutual Fire Ins. Co.*, 206.

2. A contract in a policy of insurance to pay the loss on a certain day after proof thereof, is not a contract to pay interest after that day if the loss be not then paid. *Oriental Bank* v. *Tremont Ins. Co.*, 1.

3. The mortgagee of a vessel, and the general owner who was in possession, each procured insurance of his interest therein; and on the loss of the vessel, each brought an action on his policy, in different courts. The action brought by the general owner was tried and was defended by the underwriters, on the ground that the plaintiff fraudulently caused the loss; but the plaintiff obtained a verdict. The defendants took exceptions to the proceedings at the trial, for the purpose of bringing a writ of error. Afterwards a compromise was made by all the parties to the insurance, without any misrepresentation or concealment by the mortgagee, and the underwriters agreed to pay the amount of the verdict obtained against them by the general owner, and to pay a part of the mortgagee's loss, which he agreed to accept in full of his claim. The underwriters thereupon gave their note to the mortgagee for the amount thus agreed on, and he withdrew his action against them. *Held*, in an action on this note, that the underwriters could not defend, by introducing evidence, discovered after the compromise and note were made, of the general owner's fraud in causing the loss of the vessel. *Barlow* v. *Ocean Ins. Co.*, 270.

INTEREST.

Where underwriters do not contract to pay interest on a loss after the day on which, by their contract, the loss is payable, they are not chargeable with interest after that day, during the time a trustee process is pending against them, which is commenced by a creditor of the assured before that day, if they practise no delay, and are ready, at all times after the loss is payable, to pay it on being discharged from the trustee process; although they do not keep the amount of the loss constantly on deposit, but mingle it with their other funds and use it in their business. *Aliter*, it seems, if they practise unreasonable delay in making their answers in the trustee process, for the purpose of obtaining a longer use of the money. *Oriental Bank* v. *Tremont Ins. Co.*, 1.

2. In a suit, to recover back the amount of taxes paid, without protest, on an illegal assessment, the plaintiff is entitled to interest thereon from the time of demanding repayment; or from the date of the writ, when no previous demand is made; but when such taxes are paid under protest, the plaintiff is entitled to interest thereon from the time of payment. *Boston & Sandwich Glass Co.* v. *City of Boston*, 181.

JUDGMENT.

A judgment of a court in another state is not entitled to full faith and credit, under the constitution and law of the United States, unless the court had jurisdiction of the parties as well as of the cause. *Gleason* v. *Dodd*, 333.

2. In an action on a judgment rendered in another state, the defendant may impeach such judgment by proof that he had no legal notion of the suit, and never appeared therein and submitted to the jurisdiction of the court, either in person or by authorized attorney. *Ib.*

3. The record of a judgment, rendered in another state against the administrator of the original plaintiff in the

suit, set forth that the death of such plaintiff was suggested, and that "D., administrator, then came in," and that "the plaintiff, administrator, as aforesaid," afterwards became nonsuit, whereupon judgment was rendered against him for costs. In an action on this judgment, brought in this state against the administrator, it was held that he might prove, in defence, that he never appeared in the original suit, nor authorized any one to appear for him and prosecute the same. *Ib.*

4. In an action in this state on a judgment of a court in another state, rendered for costs against a plaintiff in a suit commenced there, he may defend successfully by showing that he gave no authority to institute such suit, and had no knowledge thereof before judgment was rendered therein. *Watson* v. *New England Bank*, 313.

LANDLORD AND TENANT.

A lessee who erects on the demised premises a building, which he has a right to remove, renounces that right by surrendering his leasehold interest to the lessor, without reservation: and the right is not revived by his subsequently taking another lease of the same premises, from the same lessor. *Shepard* v. *Spaulding*, 416.

2. Where a lessee for years conveys his leasehold interest to his lessor, who is owner of the fee, by an instrument in the form of the lease which he received from him, the legal operation of such instrument is a surrender of the lease, and a merger of the term. *Ib.*

LIMITATIONS, STATUTE OF.

Where the holder of a note which by the terms thereof, has been due more than six years, brings a suit on a sealed instrument in which he and the defendant had agreed that payment of the note should be postponed for a certain time, and that it should afterwards be paid on certain conditions, the statute of limitations is not a bar to such suit. *American Bank* v. *Baker*, 164.

2. The provision in the Rev. Statutes, ch. 120, § 4, which excepts from the operation of the statute of limitations an action by the original payee, &c. of a promissory note signed in the presence of an attesting witness, does not apply to an action by the first indorsee of a note made payable to the promissor's own order, and by him signed and indorsed in blank, at the same time, in the presence of a person who puts his name thereto, as an attesting witness to the promisor's signature on the face of the note, but not to the indorsement. *Kinsman* v. *Wright*, 219.

3. A debtor gave to his creditor a note, signed in the presence of an attesting witness, and made payable to a bank. The creditor received the note in satisfaction of his demand on the maker, and sold and delivered it to a third person, who kept it in his possession for fifteen years, and until after the maker's death, and then prosecuted an action thereon for his own benefit, in the name and with the authority of the bank, against the maker's executors. *Held*, that the case was not within the exception of the statute of limitations, as to attested notes, (Rev. Sts. ch. 120, § 4,) and that the action could not be maintained. *Village Bank* v. *Arnold*, 587.

MALICIOUS PROSECUTION.

In an action for a malicious prosecution, the plaintiff must prove by the record, or a copy thereof, the proceedings in the prosecution against him, and his acquittal. *Salyes* v. *Briggs*, 421.

2. Where a magistrate has authority only to bind over or discharge a person accused, and he discharges him, the discharge is equivalent to an acquittal, and will avail the accused as evidence to support an allegation of acquittal, in a declaration for malicious prosecution. *Ib.*

MANUFACTURING CORPORATION.

Manufacturing corporations are not taxable for their personal property, except for their machinery. Such property is to be assessed to the owners of shares in the stock of such corporations. *Boston and Sandwich Glass Co.* v. *City of Boston*, 181.

2. The poll tax of minors who are in the service of a manufacturing corporation, and receiving salaries, cannot legally be assessed to such corporation. *Ib.*

MASTER AND SERVANT.

Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in

which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service. *Farwell* v. *Boston and Worcester Railroad Corporation*, 49.

2. A railroad company employed A., who was careful and trusty in his general character, to tend the switches on their road; and after he had been long in their service, they employed B. to run the passenger train of cars on the road; B. knowing the employment and character of A. *Held*, that the company were not answerable to B. for an injury received by him, while running the cars, in consequence of the carelessness of A. in the management of the switches. *Ib.*

MORTGAGE.

A first mortgagee who makes an entry for condition broken, according to the provisions of the Revised Statutes, ch. 107, § 2, but permits the mortgagor to remain in possession as before, without accounting for rents and profits, does not render himself liable to account with the second mortgagee for the rents and profits, although he makes such entry for the purpose of preventing the creditors of the mortgagor from attaching the crops growing on the mortgaged premises. *Charles* v. *Dunbar*, 498.

2. In an action by a mortgagor or his assignee, to recover back money overpaid to a mortgagee in possession, in order to prevent a foreclosure, the same legal and equitable rules are to be applied, which are applicable to a settlement of the mortgagee's account, upon a bill in equity brought against him to redeem: And in such action, it is not to be left to the jury, as an open question, whether the mortgagee's charges are reasonable; that being a question of law, to be decided by the court, according to the facts and circumstances to be found by the jury. *Cazenove* v. *Cutler*, 246.

3. Disbursements made by a mortgagee in possession for condition broken, to which the mortgagor or his assignee, with a knowledge or means of knowledge of the facts and circumstances, agrees and consents, are to be deemed reasonable, and must be reimbursed. *Ib.*

4. A mortgage of growing wood and timber, made by one who has purchased the same, is a mortgage of personal property, to take effect as such, when the wood and timber shall be severed from the freehold; and it will avail the mortgagee, if it be duly recorded in the town clerk's office, although not recorded in the registry of deeds. *Claflin* v. *Carpenter*, 580.

5. A mortgage of a building, "and also such tools, and other property as is now contemplated to be placed in said building," with a covenant that the instrument shall be effectual to create a lien on such property, does not create a lien on the property afterwards placed in the building, but is void for uncertainty, as against a mortgagee of the property, whose mortgage is executed after the property is placed in the building. *Winslow* v. *Mer. Ins. Co.* 306.

6. A mortgage of all the goods, &c. in and about a certain building, with a provision that a schedule of the articles shall be annexed, is valid as to all the articles that can be identified, though no schedule thereof is ever annexed to the mortgage. *Ib.*

PARTITION.

Where one of several tenants in common of land, without leave or objection from his co-tenants, occupied it exclusively, and sowed it with grain, and partition of the land was made while the grain was growing; it was held that the grain, growing on the property of each owner of the land, became the property of each in severalty. *Calhoun* v. *Curtis*, 413.

PARTNERSHIP.

Real estate purchased by partners for the partnership business and with the partnership funds, though conveyed to them by such a deed as, in case of other parties, would make them tenants in common, is considered in equity, as part of the partnership stock, and is to be applied, if necessary, towards payment of the partnership debts. Though such estate is considered at law, as the several property of the partners, yet it is held subject to a trust arising by implication of law, by which it is liable to be sold and the proceeds brought into the partnership fund, so far as is necessary to pay the debts of the firm; and neither the widow nor the heirs of a de-

ceased partner can claim any beneficial interest in such estate, until the claims of the creditors of the firm are satisfied. *Burnside* v. *Merrick*, 537.

2. A sealed contract, executed by one of several partners in the name of the firm, binds the firm, if the other partners assent to or ratify such contract; and their assent or ratification may be by parol authority previously given, or by acts or parol admissions, or by acts without any parol admissions afterwards; provided the acts be such as would not have been done if such assent had not been given. *Swan* v. *Stedman*, 548.

3. Where a partnership is formed for a limited time, and one of the partners executes, in the name of the firm, a sealed contract concerning business which is to be continued beyond that time; the other partners, although they do no new business, as partners, after that time, and although they have no knowledge of such contract until after that time has expired, may, nevertheless, before the concerns of the partnership are closed, ratify such contract, so as to be bound thereby, by mere silent assent thereto. *Ib.*

4. Where a company was formed for the purpose of purchasing timber land in Maine, and getting the lumber therefrom and selling it, and officers were appointed to take the general management of the concerns of the company, with power to appoint agents to transact its business; it was held, that an agent, appointed by such officers, had authority to give a negotiable note of the company in payment for services of laborers employed by him in getting out lumber, and that the members of the company, as partners, were liable to an action by the indorsee of such note. *Tappan* v. *Bailey*, 529.

5. Where it is ascertained, by partners who are about closing their partnership concerns, that a balance will be due to one of them on a final settlement, although the exact amount of such balance cannot be ascertained, yet if the debtor partner gives the creditor partner a promissory note for a sum not exceeding the amount of the balance which will be due on a final settlement, such note is given on a good and sufficient consideration, and payment thereof may be enforced by action at law, though the balance is not struck between the partners. *Rockwell* v. *Wilder*, 556.

6. Where an administrator, who is a member of a partnership, applies to the partnership concerns money which belongs to the estate of his intestate, and afterwards gives the note of the firm to the creditor of the intestate, to whom such money was due, in discharge of such creditor's claim on the estate of the intestate, the firm is bound to pay the note, although the money was not in the hands of the firm when the note was given. *Richardson* v. *French*, 577.

7. A. of London, gave a letter of credit to B. and C. of Boston, (partners in a shipment) who thereupon drew bills on A., which he accepted and paid. B. had other accounts with A., in which C. had no concern; C. had funds in the hands of B., and requested B. to remit to A. and close the account of B. and C. B. afterwards made a remittance to A., and advised him, by letter, of other forthcoming remittances, and requested him to apply the sum, which was actually remitted, to B.'s account generally, and place the bills which A. had accepted and paid for B. and C. to B.'s debit. This letter was shown to C. before it was forwarded to A. A. replied, that he had received B.'s letter, and "noted the contents;" this letter was also shown to C. Before this letter was received, B. failed, being largely indebted to C.; and in about seventy days after the letter was written, A. suspended payment, not having, in his correspondence, again alluded to B.'s request to debit him with the bills accepted and paid for B. and C. About four and a half months after said letter was written, A forwarded his account against B. and C., and it was put in suit. Held, that A. had not, by the terms of his letter to B., agreed to discharge C., and look for payment to B. alone; that there was no consideration for such agreement, if it had been made, and that A. was entitled to recover of B. and C. *Wildes* v. *Fessenden*, 12.

PENSION.

A pension was granted to the widow of an officer, conformably to the acts of congress, passed on the 4th of July 1836, and the 3d of March 1837, and she died before the pension certificate was issued, having disposed of her pen-

sion by will: Held, that the pension was payable to her executor, and not to her children, and that he was entitled to recover the same from the children, to whom it had been paid by order of the officers of the United States, who had charge of the matter of pensions. *Foot* v. *Knowles*, 386.

PLEDGE.

A bank made a loan and took a pledge of the borrower's shares in its stock, as collateral security, with a power of sale if payment should not be made according to the terms of the loan. After the borrower's decease, the bank sold the shares by auction, for non-payment, became the purchaser, gave credit for the amount of the same, and claimed the balance of the borrower's administrator, who refused to sanction the proceeding. Held, that nothing passed to the bank by this form of sale, but that it still held the shares under its original title, as collateral security. *Middlesex Bank* v. *Minot*, 325.

POOR DEBTORS.

Where two justices of the quorum administer to a poor debtor, committed on execution, the oath prescribed by the Rev. Stat. ch. 68, § 9, but state in their certificate to the jailor that they administered the oath prescribed by St. 1816, ch. 55, they may amend such certificate by conforming it to the truth, even after action brought upon such debtor's bond for the liberty of the jail limits; and such amended certificate shall avail the defendants in such action. *Ward* v. *Clapp*, 454.

PRINCIPAL AND AGENT.

The agreement of the agent of a mortgagor, or his assignee, to the employment, by the mortgagee in possession, of a person to take charge of the mortgaged estate, at a certain rate of compensation, binds the principal so long as the agency continues, and is competent though not conclusive evidence that the same compensation should be allowed for the like services during the residue of the time that the mortgagee retains possession. *Cazenove* v. *Cutler*, 246.

2. A factor sold goods of his principal to several different purchasers, on credit, and also sold his own goods, on credit, to one of the same purchasers, and took a note, payable to himself, for the amount of his own goods and those of the principal. He rendered an account of sales to his principal, stating at the foot thereof that the balance would be "due by average, if collected," on a certain day, and directed the principal to charge him "with sales due on" that day, the amount of the balance of said account. He afterwards made advances to the principal, and gave him a negotiable note, payable on demand, for the balance of the account as before rendered. The purchaser of whom the factor took a note, as aforesaid, failed before the term of credit had expired, and paid nothing for the goods for which his note was given. *Held*, in a suit on the note thus given by the factor, that these facts did not show conclusively, that he was bound to pay the note in full, as they did not show a final settlement and payment of the account; but that, on these facts, so much of the consideration of the note, as included the debt of the insolvent purchaser, had failed, and that for so much of the note, the factor was not liable. *Hapgood* v. *Batcheller*, 593.

PROMISSORY NOTE.

A note was made to C. dated at Buffalo, payable at a bank in Cleveland, Ohio, and by C. indorsed: Payment of the note was demanded at said bank, at maturity, by a notary public, who, upon being informed that C. resided in Buffalo, seasonably put into the post office a notice of non-payment, directed to him at that place. *Held*, that the notice was sufficient to charge C. on his indorsement. *Wood* v. *Corl*, 203.

2. In the absence of proof to the contrary, the legal presumption is, that in every state in the Union, three days' grace is allowed by law on bills of exchange and promissory notes. *Ib.*

3. Where a suit is brought in this state on a note payable, on a day certain, in another state, without interest, the plaintiff is entitled, in the absence of evidence as to the legal rate of interest in that state, to compute interest, by way of damages for non-payment, at the legal rate of interest in this state. *Ib.*

4. Where the payee of a promissory note, which is made by one citizen of this state to another citizen thereof, indorses it specially to a citizen of another state, who dies and whose will is admitted to probate in that state before

the note falls due, and his executor, without taking administration in this state, sends the note to a notary public in this state, with directions to demand payment of the maker at maturity, and the notary demands payment accordingly, which the maker refuses generally without objecting to the notary's authority, and the notary thereupon gives due notice of non-payment to the indorser's executors; such demand and notice are sufficient to charge such executors; and an administrator of the estate of the indorsee within this state, who is afterwards duly appointed here, according to the provisions of the Rev. Sts. *c.* 62, is thereupon entitled to maintain an action against them on the note. *Rand* v. *Hubbard*, 252.

5. Where the payee of a note, at the time it was signed by the maker, and as a part of the same transaction, indorsed thereon a promise not to compel payment thereof, but to receive the amount when convenient for the maker to pay it, it was held that the indorsement must be taken as part of the instrument, and that the payee could never maintain an action thereon. *Barnard* v. *Cushing*, 230.

6. An accommodation note, which was made as collateral security for a debt due from a third person to the payee, was negotiated by the payee after it fell due and after the debt had been paid: The holder offered it to A., one of his creditors, on certain terms, and gave him liberty to take it, for the purpose of inquiry, before he should accept or reject the offer: A. presented the note to the maker, telling him he had taken it as money, and asked him if he would pay it: The maker, not knowing that the said debt was paid and the note negotiated after it was due, concealed no fact, of which he was aware, from A., but told him that it was an accommodation note which he did not expect to pay; that he should be obliged to pay it, and would pay it, if three months' time were given him; otherwise, he should contest it. A. then informed the holder that he should not take the note on the terms offered, but proposed to take it on certain other terms, to which the holder assented: After the expiration of three months, A. sued the maker on the note. *Held*, that the defendant's promise to A. was without legal consideration, and that he was not estopped thereby to make the same defence against A. which he might have made against the payee. *Mackay* v. *Holland*, 69.

RELEASE.

A. indorsed promissory notes and bills of exchange for the accommodation of B., and before they fell due B. failed and made an assignment of all his property for the benefit of his creditors: In this assignment A.'s liabilities for B. were set forth, and A. was placed among the preferred creditors: A. and others accepted the assignment and released all their several debts, dues, claims and demands against B. B.'s property, which was assigned, was insufficient to pay the preferred creditors in full, and the proceeds thereof were divided among those creditors. *Held*, that the release discharged B. from any further liability to indemnify A. against the indorsements of said notes and bills. *Pierce* v. *Parker*, 80.

2. B. assigned all his property in trust for the payment of his debts, and the securing of his indorsers whose liabilities for him were set forth in a schedule annexed to the deed of assignment: The indorsers of his notes and the holders thereof, with other creditors, accepted the assigned property in full payment and discharge of all claims which they then had, or thereafter might have, on account of all demands, actions, causes of action and moneys mentioned in said schedule; and covenanted not to sue or molest B. on account of the same. *Held*, that the terms of the instrument were sufficient to release B. from all liability to his indorsers. *Held also*, that the indorsers of B.'s notes were not released by the holders, whether the notes, at the time of the execution of the release, were outstanding in the hands of parties who did not join in executing it, or were then in the hands of indorsees who did execute it. *Reed & Beals* v. *Tarbell*, 93.

SCIRE FACIAS.

A judgment was recovered by default, in a writ of entry against a mortgagor, by the administrators of a party, who, at the time of his decease, held the mortgage by a transfer thereof to him, but without any written assignment. The mortgagor, after the action

was commenced, but before it was entered in court, conveyed all his interest in the mortgaged premises to M., and died before execution issued on the judgment. His widow was appointed administratrix of his estate, and her dower therein was assigned to her out of said mortgaged premises. A writ of *scire facias* was brought against the widow and M., to obtain an execution against them, on the said judgment against the mortgagor. *Held*, that the writ could not be maintained. *Sigourney* v. *Stockwell*, 518.

2. On a *scire facias*, the defendant cannot plead nor give in evidence facts, which might have been used by way of defence in the first suit. *Ib.*

SET-OFF.

Where the official bond, given to a town by a collector of taxes and his sureties, is several as well as joint, and the collector brings an action against the town on a demand which is itself the subject of set-off, the defendants may set off their claim on such bond for money which the plaintiff has received on tax bills committed to him for collection, and which he has not accounted for nor paid over. *Donelson* v. *Inhabitants of Colerain*, 430.

TRUST AND TRUSTEE.

When a testator devises property to two trustees, and they both decline the trust, the probate court has authority, under the Rev. Sts. *c.* 69, § 8, after notice to all persons interested, and with their assent, to appoint a single trustee to execute the trust. *Greene* v. *Borland*, 330.

2. A testator, after making several bequests, devised one half of the residue of his property to A. and the other half to two trustees, to hold the same in trust for B., the wife of G., during her life, and on B.'s death to convey the same to B.'s children: The trustees both declined the trust, and the probate court, after notice to B. and G. and to B.'s children, and with the assent of B. and G. and of the guardian *ad litem* of B.'s children, appointed a trustee to execute the trust created by the testator. *Held*, that A. was not a person interested, within the meaning of the Rev. Sts. *c.* 69, § 8, and was not entitled to notice, in order to render valid the appointmment of the new trustee. *Ib.*

USAGE.

Where contradictory evidence was offered as to the existence of a usage on which the plaintiff relied to support his action, and the jury were instructed, that if it was proved that the usage existed, and the defendant knew it existed, the plaintiff was entitled to recover, and the jury thereupon returned a verdict for the defendant; it was *held* that the plaintiff had no cause of exception to such instruction. *Winsor* v. *Dillaway*, 221.

2. *Quære* as to the reasonableness of a custom for ship-brokers to receive a commission of the seller of a vessel, when they introduce the purchaser to him, without being employed in the negotiation. *Ib.*

USE AND OCCUPATION.

A. made an oral agreement for the purchase of B.'s house, advanced the purchase money, and took possession: Before A. obtained a deed, the house was destroyed by fire, and he thereupon vacated possession of the ground, refused to accept a deed which B. tendered to him immediately after the fire, and commenced a suit against B. in which he recovered back the purchase money. *Held*, that A., during his occupation of the house was tenant at will, and that he was liable to B. in an action of assumpsit for use and occupation. *Held also*, that A., by refusing to accept a deed from B., determined the tenancy at will, and was no longer liable to him for use and occupation. *Gould* v. *Thompson*, 224.

VERDICT.

On the trial of an indictment for an assault on M., with an intent to ravish and carnally know her, by force and against her will, the jury returned a verdict that the defendant was "not guilty of an assault with an attempt to commit a rape, in manner and form," &c., but that he was "guilty of an assault upon and improper and unlawful intercourse with the said M.," at the time and place in the indictment mentioned. *Held*, that this was not a special verdict, and that it warranted a judgment against the defendant for a simple assault. *Commonwealth* v. *Fischblatt*, 354.

Notices of New Books.

THE REPORTERS CHRONOLOGICALLY ARRANGED, WITH OCCASIONAL REMARKS UPON THEIR RESPECTIVE MERITS. By JOHN WILLIAM WALLACE. Philadelphia: L. R. Baily, Printer. 1844. pp. 77.

These pages are like the rib which was taken from Adam in the garden of Eden, and served to make a separate person. They compose an article in the *American Law Magazine*, the Philadelphia substitute to our early companion, by whose side we travelled in pleasant fellowship for several years, the *American Jurist*, — and merit, in no ordinary degree, the distinction they enjoy in being reprinted, and sent into the world, away from the protection of the journal of which they formed a part. It is rare that we see any professional labors, which we go forth to meet with more spontaneous praise than this little book. The modesty of the author has not permitted him to magnify his subject, an unnecessary task, perhaps, since its importance cannot fail to commend itself to every enlightened lawyer, and to every student, whose inquiries have extended beyond the very hornbooks of the law. We do not know of any professional tract of equal compass, which is so truly useful.

We are reminded by it of the *Judicial Chronicle* of Mr. George Gibbs, whose early interest in the law, from which his friends augured for him such eminence at the bar, seems to have yielded to the blandishments of literature and the attractions of other subjects. His *Chronicle* was prepared while he was still a student at Cambridge. It presents a complete list, chronologically arranged, of all the judges in all the courts of England, and the names of the reporters in connection with them. It embodies the most important part of the old Chronicles of Dugdale, and we believe that it was these that suggested to Mr. Gibbs the idea of his publication. The interesting volume of Mr. Ram, on the science of Legal Judgment, Hoffman's Course of Legal Study, Bridgman's Legal Bibliography, two articles in the American Jurist on the characters of law books, and the two admirable lectures of Chancellor Kent on Reports and the principal Publications of the Common Law, cover, to some extent, the ground which Mr. Wallace has occupied. But, on many accounts, the tract now before us is better calculated than any of these to be of practical use in the profession. In it the Reporters are considered chronologically; the periods traversed by their different labors are carefully defined; and the value of these labors, as affected by the character of the court and reporter, is determined. It is suggested, that this tract may prove useful to persons desiring to arrange or complete their libraries. We would add, that it cannot fail to be useful to every student and lawyer, who has occasion to consult a volume of reports.

In the present multiplicity of law books — while reports seem to be stretching on to the crack of doom — the most earnest student may look with despair upon the labors before him. Alas! for those good old days, even after Sir Edward Coke was cold in his grave, when it could be said that all the books of the common law might be carried in a wheel-barrow. Such a quantity, even if dark with black letter, we might hope to read; but who can hope to read all the volumes which now clothe the walls of our libraries? After becoming ac-

quainted with the outlines of jurisprudence, the chief aim of the student, which he should never lose from his sight, should be to possess the keys, so to speak, of the library of law. He should render himself familiar with the characters of books, and the distinctive merits of different editions; in this way he will be able to use them with facility and despatch, and will be prevented, in his own studies, from putting trust in a book that is not trustworthy. One of the strong recommendations of Mr. Hoffman's Course of Legal Studies, is to be found in the aid which it is calculated to afford the student in his *bibliographical* inquiries. But no work will be of such substantial service in illustrating the reporters as Mr. Wallace's little book.

We observe, that in mentioning Yelverton, he records the tribute offered by a distinguished authority to the edition and annotations of Mr. Metcalf; in mentioning Hobart, he expresses a regret, in which we most cordially join, that the learned judge, who has enriched the American edition with valuable notes, allowed any cases to be omitted; for although every case is supposed to be retained which could be useful to the lawyer of our country, still there are few persons who have had occasion to refer to this volume, without at some time being disappointed by not finding the authority desired. On a subsequent page Mr. Wallace says; "it is an interesting fact, that American lawyers should have given to England the *latest* and best editions of two of her early reporters." Many years after the American edition of Yelverton, this Reporter was republished in England, with annotations scarcely inferior to those of Mr. Metcalf. Ours may be the *best* edition, but it is not the *latest*.

New Commentaries on the Laws of England. Partly founded on Blackstone. By Henry John Stephen, Sergeant at Law, author of the Treatise on Pleading, &c. &c. First American edition. Vol. II. New York: John S. Voorhies. 1843.

We are spared a notice of the slovenly manner in which the American edition of this valuable work is got up, by the following remarks of a New York correspondent: —

To the Editor of the Law Reporter:

I would express through your journal my high gratification, that the second volume of *Stephen's New Commentaries on the Laws of England* has recently been republished in this country, by Mr. John S. Voorhies, Law Bookseller, of New York. This work fully sustains the high legal and literary reputation of the author, who first became most favorably known to the profession in this country, by his most valuable, and, it may be said, even entertaining work on Pleading, published several years ago. It would, perhaps, be going too far to say, that these New Commentaries will supersede the work of Blackstone, on which they profess partly to be founded; but it may safely be affirmed, that, in order to obtain even a tolerable insight into the state either of the English common law, or of that law as modified or altered in England by statute, it is absolutely indispensable to read Mr. Stephen's Commentaries, in connection with Blackstone's. Mr. S. has most clearly and elegantly elucidated several subjects, to which Blackstone merely glanced; for example, the subject of *Uses and Trusts*.

My object, however, is not, in this communication, to take a critical review of Mr. Stephen's work; but to call your attention to the insufferably careless manner in which this second volume is printed — I mean *typographically*. It informs the reader that it was printed at West Brookfield, Mass., by Merriam & Cooke. I think that no printer has any right to expect employment from any publisher, who executes his work so carelessly or ignorantly as is done in this instance. Nor can any publisher reasonably expect the patronage of the public, who offers to them a work so full of typographical mistakes and blunders; if indeed it be correct to call those merely typographical blunders, where one word is erroneously printed for another, and in some cases essentially altering the sense of the author and inculcating false ideas. I find no fault with the general dress and appearance of the work, although it bears no comparison in this respect with the law books published recently in Boston and its vicinity, which reflect great credit

on the American press. I refer especially to the works of Judge Story, Mr. Greenleaf's work on Evidence, and the Reports of the Massachusetts Supreme Court.

With respect to this republication of the second volume of Stephen's Commentaries, I would ask why it should be postponed *more than a year after it was announced in this country, that it was published in England?* I trust that when the next volumes appear there, some vigilant publisher in this country will deem it for his interest to give them more speedily to the public. Lest I may be thought too censorious, I add a list of the errors which I have noted in this second volume, on a hasty perusal, to the 299th page only.

Page.	line from top.	printed for	
35,	24th,	comparitively	comparatively.
36,	26th,	arrable	arable.
37,	21st,	inbecility	imbecility.
66,	18th,	where	were.
84,	20th,	mean	meam.
102,	14th,	af	of.
111,	9th,	inkeeper	innkeeper.
157,	23d,	or	of.
168,	22d,	muturity	maturity.
168,	23d,	payment	non-payment.
171,	23d,	drawer	drawee.
227,	15th,	deposal	disposal.
257,	3d,	perronal	personal.
259,	17th,	implements	emblements.
268,	18th,	gentiam	gentium.
285,	23d,	nullias filias	nullius filius.
284,	9th,	consumate	consummate.
286,	10th,	postivi	positivi.
297,	23d, 25th,	memo	nemo.
298,	15th,	of a person	of her person.
	27th,	fiagellis	flagellis.

Respectfully yours, SENEX.

December 6, 1843.

EULOGY ON HUGH SWINTON LEGARÈ; DELIVERED AT THE REQUEST OF THE CITY OF CHARLESTON, by W. C. PRESTON, November 7, 1843. Published by order of the Mayor and Aldermen of Charleston. pp. 31.

This is the tribute of a distinguished orator to a departed friend. Mr. Legaiè and Mr. Preston were bound together by the cherished ties of early companionship in studies, by coöperation afterwards in the arduous labors of life, by a participation together in the councils of the nation, and in the admiration and regard of their fellow-citizens of South Carolina, and of the whole United States. It was proper, therefore, that he, whom the dart had spared, should refresh in our minds the memory of the virtues and services of his departed friend.

Mr. Preston has sketched the character of his friend with distinctness and brilliancy. The style is uniformly elevated, and breaks forth at times into passages of striking eloquence. In Mr. Legarè's crowded life of scholarship and forensic studies, we find much to applaud and to imitate, so far as we may. And it is with no ordinary regret, that we witness the premature setting of so glorious an orb of light. The learning he had hived, the rich harvests of scholarship he had garnered up, the acquisitions of a life of unequalled industry, have been removed with their possessor; for, alas! these cannot, like earthly riches, be left in legacy behind. But his example is not dead; and this will continue to speak to students, in no feeble tones, animating them in their labors, and teaching them the value of knowledge, and of the industry by which the scholar and lawyer achieve their fame.

COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW. By JOSEPH STORY, L. L. D. One of the Justices of the Supreme Court of the United States, and Dane Professor of Law in Harvard University. Second Edition, Revised, Corrected and Enlarged. Boston, Little & Brown; London, Maxwell & Son. 1844.

When the first edition of this work was published in 1839, the learned author announced it as the commencement of a series of commentaries, which, in pursuance of the original scheme of the Dane Professorship, it was his design, if his life and health were prolonged, to publish upon different branches of commercial and maritime jurisprudence. The invaluable treatises which, in rapid succession, have been presented to the profession, attest how successfully this design has been carried out. It is not our intention to enter into an examination of this admirable treatise at the present time. The work is too well known to the profession and

has been too generally circulated to require any praise at our hands. We merely remark, that in the present edition the author has availed himself of the opportunity carefully to revise the text, to supply such deficiencies, as occurred to him in the course of the revision, and to add such illustrations and development of principles, as the recent authorities have brought to his notice.

THE REVISED STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, AND ADDITIONAL LAWS TO 1844, REDUCED TO QUESTIONS AND ANSWERS FOR THE USE OF SCHOOLS AND FAMILIES. By WILLIAM B. WEDGWOOD, A. M., Member of the New York bar, author of the Revised Statutes of New York, New Hampshire, Maine, Connecticut, et al. reduced to a similar form — pp. 116.

We are told, in the preface of this book, that the secretary of state in New York, a few years ago, in his report to the legislature, as superintendent of common schools, used the following language. "It is to be regretted, that in most of the schools, there is no attention paid to giving a young man instruction in regard to the peculiar duties which devolve upon him as a free citizen of a representative government. Each scholar ought to have an opportunity, *in the schools*, of becoming acquainted with the principles of our constitution and laws, and be enabled to understand something of our state and national government."

Such a work the author professes to have undertaken to execute. In the following language he gives his notions of the manner in which it ought to be done "The child cannot study to advantage the constitution and laws of our state or nation in the form in which they are laid down in our law-books." "Some one must submit to the task of reducing the whole to a cheap, attractive form — of adapting the whole to the capacity of the pupil — of removing, as far as possible, every obstruction — and, in cases where the stride is too great for the capacity of the scholar, to introduce an intermediate step. It is indeed a laborious task. The spirit and the letter of the law must be retained as far as possible; but the capacity, the opening development of the mind, must never be lost sight of."

We agree with the author that a good school book on this subject would be very useful. We also think that he has well described, in the extracts from his preface given above, what such a book should be. We therefore propose to take his own tests, and try the book by them, only varying a little the order of his enumeration.

He says such a book should be *cheap*. Doubtless it should come within the means of scholars, or their parents, or guardians. Twenty-five cents — the retail price of this book, is not high, as compared with the prices of many school books; whether it is high as compared with the real worth of the book, depends, of course, upon the manner in which it has been made.

It should be *attractive*, says the author. True; and that not only in mechanical execution, but particularly in its adaptation to the capacity of the scholar. Of this we shall say something below.

The *whole* law, he says, should be '*reduced;*' meaning of course, the whole of that which it would be practically useful to the community generally to know, as distinguished from the members of the legal profession. In this sense we suppose the author wished to be understood, and we think it is the correct one. What, then, are the sources of the *whole* law, taken in this sense, in force in Massachusetts? We answer, they are the old common law of England, (including the commercial law,) the constitution and statutes of the United States, and the constitution and statutes of Massachusetts.

We confess that we are somewhat surprised that the author, after expressing in his preface, broad and comprehensive, and, we think, just views of the requisites of a school book on this subject, should have taken his materials only from the last of the sources above mentioned, — namely, from the constitution and statutes of Massachusetts. In our judgment, this circumstance alone shows the book to be grossly incomplete. Is it not equally important that the young citizen should be well informed of his relations to the union, as of his relations to his own state? In fact, the proper understanding of the former is becoming every year of increased importance.

But that a member of the bar, in compiling a book like this, should have totally neglected to draw anything from the sources of the common law, is not a little remarkable. What are the statutes of Massachusetts? As every lawyer knows, they are but the alterations, and adaptations to our local necessities, of the old common law of England — the latter constituting the great and principal source of the rules of action, by which the business of life is governed. Our reports of cases decided are alone sufficient and incontestable evidence of the

fact, that rules and principles of law, not contained in our Revised Statutes, are very numerous, and of equal interest and importance with those there recorded.

It was stated, a few years ago, in a public lecture, we believe by Theron Metcalf, that four-fifths of all the litigation in Massachusetts, grew out of the law of contracts. That but an inconsiderable part of this law, in its various ramifications of principal and agent, bailments, hiring, common carriers, sale, &c. &c. is found in our Revised Statutes, and that the principal part is contained in the sources of the common law, every lawyer well knows. To take an illustration from the criminal law, (which however, we give not so much on account of its intrinsic importance, as because the author, in his preface, speaks of the value of a knowledge of criminal law, and of the penalties of crimes, as a means of preventing crime,) the crime of procuring abortion is not mentioned in our statutes; yet for it, a person may be indicted in Massachusetts, under the common law, and punished by imprisonment; and if death ensue, it is murder. But it is needless to argue this topic.

Not only is the book, as we say, grossly incomplete, but much that is trivial is inserted. The scholar is informed that for killing a wolf, he may receive fifteen dollars, from the town treasurer; for killing a wolf's whelp, ten dollars; that the penalty for selling rockets, without a license, is five dollars; and for poisoning fish with *coculus indicus*, ten dollars, &c. &c.

The title page of this book says that it contains not only the Revised Statutes, (passed in 1836,) but also the additional laws to 1844. We cannot see why the latter clause should have been inserted, except to give the impression that the book is a complete one, so far as it goes. On turning it over, we find that the author, after abstracting and digesting, (in his own fashion,) the Revised Statutes, by titles and chapters, devotes just a page and a half, under the head of 'Laws of 1843,' to the additional laws from 1836 to 1844, omitting entirely all notice of the laws passed in the other seven years. We mention this, because it seems to us a mere trick to make the book pass for a complete one.

Again; we are told in the preface, that that such a school book should be adapted to the capacity of the pupil. Admitting this, a more striking example of disparity between promise and performance could not easily be found than the book now before us. Technical words are frequently used, without definition or explanation. The author speaks of original writs, original summons, transitory actions, replevin, tenements, hereditaments, &c. and without a word of explanation. It would seem that the preface must have been written before the body of the work, and that the author anticipated a more "laborious task," than he subsequently performed.

We have taken up more space in the notice of this book than we should if it were not the first work of the kind, professedly for schools, which has come to our knowledge. To introduce it into schools in Massachusetts, would, in our judgment, be a waste of both money and time. We think it no injustice to the author, giving him credit for sincerity in his preface, to say, that his book bears marks of such haste and carelessness, as totally to unfit it for the use for which it purports to have been prepared.

AN ANALYTICAL DIGEST OF THE EQUITY CASES, DECIDED IN THE COURTS OF THE SEVERAL STATES, AND OF THE UNITED STATES; in the Courts of Chancery and Exchequer in England and Ireland, and in the English Privy Council and House of Lords, since the year 1836 By OLIVER S. BARBOUR, Counsellor at Law. Springfield (Mass.): G. and C. Merriam. 1843.

This volume embraces all the American, English, and Irish Equity Cases, decided since June, 1836; down to which time the cases were digested in the volumes published in the names of Mr. Barbour and Mr. Harrington, in 1837. The present volume is designed to fill up the chasm between the former period and the present, and serve as a companion to the work alluded to These four volumes are undoubtedly the most valuable, and, indeed, the only Equity Digest which we now have. The work is so well known that it needs no commendation from us, and we only add, that two hundred and fourteen volumes of Reports are digested in the present volume.

Intelligence and Miscellany.

Libel Suit.—In our August number, page 192, we copied from a Portland paper, the singular advertisement of "Francis C. Treadwell, counsellor at law and lecturer upon the constitution of the United States." It seems that this individual thought proper to commence a libel suit against the proprietors of the Portland Advertiser for their remarks upon his character, in an article pointing out the poor effects of the late statute of Maine, letting in every person to practise law, and stating that it had already been seized upon by speculating adventurers from abroad to thrust themselves into places, for which they have no qualifications and which they at once abuse to their own and the state's shame. The trial came on at Portland last month before the supreme judicial court. The plaintiff's damages were laid at ten thousand dollars. The defendants pleaded the general issue, with a brief statement of the *truth* in *justification*. There was also a notice as to a part of the words published, that the defendants would contend that the same were not libellous and did not support the innuendoes laid. The judge charged that the article, *as a whole*, was libellous, — that if the jury found the justification made out by the evidence, their verdict should be for the defendants, — if otherwise, they should find for the plaintiff with such damages as the case might seem to them to require. The jury returned a verdict in favor of the defendants. The case was conducted by General Fessenden for the plaintiff, with whom was Treadwell, *pro se*. William P. Fessenden and Phinehas Barnes for the defendants.

The late Attorney General Legarè.—We have strangely neglected to notice the ceremonies which took place in Charleston, S. C., in honor of the late Hugh S. Legarè. A procession was formed, which marched to a church, where a eulogy was pronounced by the Hon. William C. Preston. The Charleston Courier characterizes the address as a masterly effort; chaste and simple in style, yet glowing with fine imagery and pervaded by touching pathos and winning tenderness; in its narrative, full of the charm of biography, and in its more reflective portions replete with all the higher requisites of the funeral oration; at once just, generous in its estimate and delineation of the character of the deceased, and elegant and discriminating in its criticism of his productions and performances as a writer and a speaker; a worthy tribute to the illustrious Legarè, as a scholar, a jurist, an orator, a writer and a statesman, and to his character as a man of gentle virtues and pure and noble nature.

Pennsylvania Law Journal.—We noticed this work, in a favorable manner, more than a year ago, on its establishment as a weekly journal. It has now reached the third volume and is to be continued monthly, instead of weekly, having passed into the hands of H. E. Wallace, Esq., as editor and proprietor. The work is intended to be a journal and index of Pennsylvania law, and must be of great assistance to the profession in that state; at the same time it will be useful to the practising lawyer in all parts of our country. In the first number of the present volume, there is a judicious and able defence of the late bankrupt act, which was repealed by the same congress that passed it. We fully agree with the writer, that the repeal of this law is beginning to be considered as an impolitic and unadvised step; and we have no doubt, that, if such questions were decided on their naked merits, we should soon have another law of a similar character. It is somewhat amusing, by the way, to notice with how much zeal some of the bankrupts themselves opposed this law. At a political meeting in Maine, not long since, resolutions were reported against the law by a committee *composed in part of bankrupts!*

Hotch-Pot.

It seemeth that this word *hotch-pot*, is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. — *Littleton*, § 267, 176 a.

We have read, with much pleasure, several articles in the Bangor (Me.) Whig, on "Jurisprudence and Legislation," under the signature of Leonidas. They are most ably written, and, what is more, they are high-toned and manly without the least affectation. We rejoice to see such sound doctrine pronounced in a truthful style to the demagogues, who have endeavored but too successfully to make the state legislation ridiculous for several years past. We are also glad to see these articles in the Bangor Whig, and venture to express a hope, that the *editor* of that journal has read and profited by them; for unless he has changed somewhat in his juridical *notions*, there is ample room for improvement. "Many a time and oft," when time with us was young, do we remember to have entered his shop on returning from the village school, and stood by his bench, while he plied the awl and well-waxed thread, and declaimed with great energy against the law and lawyers. He was a most skilful mechanic *then*; he is an excellent editor *now*, and, we doubt not, he *might have been* a learned and able lawyer. Having said thus much, we will add, that the late proceedings of the legislature of Maine are only carrying out his *old doctrines*, and that the best possible refutation of them are the articles to which we have referred above.

The late Mr. Justice Burrough was extremely averse from the least shadow of affectation, of which some amusing instances are told. The following may pass for a specimen. A man was tried before him for stealing a pair of breeches. The prosecution was conducted by a young barrister, who, seeing a female witness in the box, and the court crowded with ladies, thought proper to speak of the stolen garment as *inexpressibles*. "*Inexpressibles!*" said the judge, "inexpressibles — I don't find any mention of such a thing in the indictment." "Why, no, my lord," simpered the counsellor; "I thought, my lord, it might be as well" —— (and he winked and nodded in the vain endeavor to inspire the judge with the same regard for propriety) "the indictment mentions *breeches*." "Then why couldn't you say breeches at once? Here, Mr. Undersheriff, please to hand them up to the lady. Now, ma'am, are you ready to swear that those are your husband's breeches?"

It is stated in the newspapers, that J. S. B. Thacher, Esq., of Natchez, son of the late Peter O. Thacher, of Boston, has been elected a judge of the high court of errors and appeals in Mississippi. Mr. Thacher is a lawyer of learning and ability, and we should rejoice at his election, if it was not also stated that the *repudiators* had carried the state at the same election. We can scarcely believe that a son of the New England judge, who has lately gone down to the grave covered with honor, would accept any office at the hands of that party who unblushingly bear aloft the banner of "*Repudiation*."

The Richmond (Indiana) Palladium says that Elizabeth Hubbard, a young woman who killed her father, last summer, in Rush county, in that state, whilst he was beating and choking his wife, and the mother of the girl, has been tried and acquitted. The trial occupied several days, and the defence was put upon two grounds — the necessary defence of the mother and mental derangement at the time. The name of the man who was killed was Philip Barger, who was notorious as a drunken, wicked profligate. The jury were out about one hour, and returned a verdict of not guilty.

The grand inquest of the Philadelphia criminal court recently found a true bill against one Neldon for highway robbery, a few weeks after his committal by the mayor. On the next morning he was tried, found guilty, and sentenced to seven years in the penitentiary. This is what the newspapers call "*summary justice*." *They* mean it as praise — *sed quære?*

It is currently reported that Mr. Choate intends to resign his seat in the senate of the United States at the present session. There are several candidates named for the succession. Among them are John Quincy Adams, Daniel Webster, John Davis, Levi Lincoln, and Leverett Saltonstal.

We understand that Daniel Webster is engaged on a history of the origin of the Federal Constitution, and the administration of Washington.

Ellis Gray Loring, Esq., of Boston, has been appointed a Master in Chancery within and for the county of Suffolk.

Obituary Notice.

Died, at his residence in Poughkeepsie, New York, on the 18th ult., Hon. SMITH THOMPSON, one of the justices of the supreme court of the United States, aged 76.

He commenced the study of the law, while he was the teacher of a school, with Chancellor Kent, who was then established at Poughkeepsie. Soon after his admission to the bar, he entered into politics; and, having married into the Livingston family, he took the republican side of politics, in the first party divisions in the state, and was brought into the majority in the great political revolution of 1801. It was in that year that he was appointed district attorney for the old middle district of the state, in the place of Elmendorf, removed. De Witt Clinton and Ambrose Spencer were at that time members of the council of appointment, and Mr. Thompson was of course brought in under what was known as the Livingston interest, in opposition to that of Colonel Burr.

Two vacancies having occurred, in 1801, on the bench of the supreme court of New York, by the elevation of chief justice Lansing to the chancellorship, and by the resignation of Egbert Benson, appointed a circuit judge of the United States, under what was called by the republicans the midnight act of John Adams, being the close of the political year of 1801-1802, Morgan Lewis was appointed chief justice of the state, and Smith Thompson an associate judge, in the place of Benson, who, by the way, was soon legislated out of office by the repeal of the judiciary law of Mr. Adams, under the influence of Mr. Jefferson.

When, in the year 1806, De Witt Clinton was the first time removed from the mayoralty of New York, judge Thompson was appointed in his place — an office, however, which he declined accepting. He had already become able as a judge, and it was fortunate for the jurisprudence of the state that he was not tempted from his high station, by the much larger pecuniary allurements held out in the office of mayor of the city, by the high fees attached to it at that period. In the year 1814, on the elevation of chief justice Kent to the office of chancellor, judge Thompson was appointed chief justice in his place; a station which he held until called to the cabinet of president Monroe, as secretary of the navy, in the year 1818. His seat, as chief justice, was supplied by the Hon. Ambrose Spencer; and the vacancy upon the bench filled by the appointment of John Woodworth, of Albany, who had formerly held the office of attorney general.

But a judicial, rather than a political, post, was the true position for Mr. Thompson. While upon the bench of his native state, during the long period of seventeen years, he had attained a high character for his legal acumen, his learning, and his unbending love of truth and justice; and, on the death of judge Brockholst Livingston — who had been called to the bench of the state at the same time with himself — in 1823, Mr. Thompson was appointed in his place as an associate justice of the supreme court of the United States.

For twenty years, therefore, had this eminent man served his country in this dignified station — adding, by his wisdom, his learning, and thorough moral purity of character, lustre even to a bench upon which sat a Marshall and a Story. Never, we believe, but once, did he entertain the idea of leaving that station, which, probably, better than any other, he was fitted, by the habits of his life, and the cast of his intellectual character, to fill. In the year 1829, when the politics of New York were distracted by the feud of anti-masonry, judge Thompson was persuaded, though with great reluctance, to stand as the national republican candidate for governor of this state, in opposition to Mr. Van Buren. It was supposed that if any man could disarm the anti-masons, and unite the national republicans, it must be just such a pure and patriotic spirit as Smith Thompson. But the effort was unavailing. The anti-masons persisted in running a third candidate, and Mr. Van Buren was chosen governor — though only by a plurality vote.

That result, probably, looking at the higher and broader interests of the whole country, was most fortunate, since it preserved for the nation, for fourteen years longer, a judge worthy of those illustrious associates upon the bench, of whom we have already spoken. As a judge, we have already awarded him a position with the first. When the bench of New York was illustrious, he was of the first three that rendered it so. The office of secretary of the navy he filled with distinguished ability. And with what an even hand, and elevated purpose, he has for twenty years poised the scales of justice in the national capital, the whole bar of the country can testify. His private life was as pure and exemplary as his public; and he has long borne his testimony to the great and sublime truths of Christianity, as a member of the presbyterian church.